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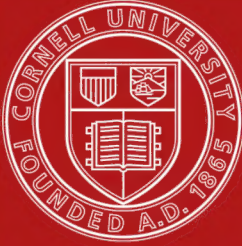
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A

SELECTION OF CASES
ON
THE CONFLICT OF LAWS

BY

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VOL. III.

THE RECOGNITION AND ENFORCEMENT
OF RIGHTS

WITH A SUMMARY OF THE CONFLICT OF LAWS

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CASES ON THE CONFLICT OF LAWS.

PART IV.

THE RECOGNITION AND ENFORCEMENT OF RIGHTS.

CHAPTER XI.

PERSONAL RELATIONS.

SECTION I.

CAPACITY.

SOMERSET *v.* STEWART.

KING'S BENCH. 1772.

[*Reported Loft, 1.*]

ON return to an *habeas corpus*, requiring Captain Knowles to show cause for the seizure and detainure of the complainant Somerset, a negro, the case appeared to be this: that the negro had been a slave to Mr. Stewart, in Virginia; had been purchased from the African coast, in the course of the slave trade, as tolerated in the plantation; that he had been brought over to England by his master, who, intending to return, by force sent him on board of Captain Knowles's vessel, lying in the river; and was there, by the order of his master, in the custody of Captain Knowles, detained against his consent, until returned in obedience to the writ. And under this order and the facts stated, Captain Knowles relied in his justification.¹

¹ The arguments of Mr. Hargrave and Mr. Alleyne for the negro, and of Mr. Wallace and Sarjeant Davy for the defendant, are omitted; they will be found at length in 21 Howell's State Trials, 1. In the course of the argument, "the court approved Mr. Alleyne's opinion of the distinction how far municipal laws were to be regarded; instanced the right of marriage, which, properly solemnized, was in all places the same, but the regulations of power over children from it, and other circumstances, very various." At the end of the arguments, Lord MANSFIELD said: "The now question is, whether any dominion, authority, or coercion can be exercised in this country on a slave according to the American laws? The difficulty of adopting the relation without adopting it in all its consequences is indeed extreme; and yet many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate." — ED.

LORD MANSFIELD, C. J.¹ We pay all due attention to the opinion of Sir Philip Yorke and Lord Chief Justice Talbot, whereby they pledged themselves to the British planters for all the legal consequences of slaves coming over to this kingdom or being baptized: recognized by Lord Hardwick, sitting as Chancellor, on the 19th of October, 1749, that trover would lie; that a notion had prevailed, if a negro came over or became a Christian, he was emancipated, but no ground in law; that he and Lord Talbot, when attorney and solicitor-general, were of opinion that no such claim for freedom was valid; that though the statute of tenures had abolished villains regardant to a manor, yet he did not conceive but that a man might still become a villain in gross, by confessing himself such in open court. We are so well agreed that we think there is no occasion of having it argued (as I intimated an intention at first) before all the judges, as is usual, for obvious reasons, on a return to a *habeas corpus*. The only question before us is, whether the cause on the return is sufficient; if it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states that the slave departed and refused to serve; whereupon he was kept to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from memory. It's so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

POLYDORE v. PRINCE.

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MAINE. 1837.

[*Reported Ware, 402.*]

THIS was a libel for an assault and battery committed by the master on a passenger, on a voyage from Guadaloupe to Portland. It appeared from the evidence that the libellant was a slave in Guadaloupe.²

WARE, District Judge. . . . It is alleged in the answer as a substantive ground of defence, and the fact is admitted on the other side that the libellant, in his own country, is a slave, and as such, incapable of appearing as a party in any court of justice; and it is contended that

¹ LORD MANSFIELD first recited the return to the writ. — ED.

² The remainder of the statement of facts and part of the opinion are omitted. — ED.

this personal incapacity upon the received principles of the *jus gentium*, or at least on the principles of national comity, follows him into whatever country he may voluntarily go, or be carried by his master. The argument is, that the institution of personal servitude, however contrary it may be to natural right, is an institution admitted and acknowledged by the law of nations; that every nation having the exclusive right to regulate its own internal polity, and to determine the personal estate or capacity of its members, all other nations are bound by the *jus gentium*, or by national comity, to take notice of, and recognize this personal status as it would be recognized in the forum of their original domicil, while they remain members of that community; that personal qualities impressed upon them by the law of their original domicil as to their civil capacities, or incapacities, travel with them wherever they go, until their legal connection with that country is dissolved. . . .

The general doctrine of foreign jurists seems to be, that the state of the person, that is, his legal capacity to do, or not to do, certain acts is to be determined by the law of his domicil. . . . If this general principle is to be received without qualification, it would seem to decide the present case at once, for it is admitted that in Guadaloupe where the libellant has his domicil, he can maintain no action in a court of justice. But though the principle is stated in these broad and general terms, yet when it is brought to a practical application in its various modifications, in the actual business of life, it is found to be qualified by so many exceptions and limitations, that the principle itself is stripped of a great part of its imposing authority. No nation, it is believed, ever gave it effect in its practical jurisprudence, in its whole extent. Among these personal statutes for which this ubiquity is claimed are those which formerly over the whole of Europe, and still over a large part of it, divide the people into different castes; as nobles and plebeians, clergy and laity. The favored classes were entitled to many privileges and immunities, particularly beneficial and honorable to themselves. It cannot be supposed that these immunities would be allowed in a country which admitted no such distinctions in its domestic policy. If a bill in equity were filed in one of our courts against an English nobleman, temporarily resident here, would he be allowed to put in an answer upon his honor, and not under oath, because he was entitled to that personal privilege in the forum of his domicil? I apprehend not. In like manner the disqualification and incapacities by which persons may be affected by the municipal institutions of their own country, will not be recognized against them in countries by whose laws no such disqualifications are acknowledged. In England a person who has incurred the penalties of a premunire or has suffered the process of outlawry against him can maintain no action for the recovery of a debt, or the redress of a personal wrong. But would it be contended that because he could not maintain an action in the forum of his domicil, that he could have no remedy on a

contract entered into, or a tort done to him within our jurisdiction? The reasons upon which an action is denied him in the forum of his domicile are peculiar to that country, and have no application within another jurisdiction. The incapacity is created for causes that relate entirely to the domestic and internal polity of that country. As soon as he has passed beyond its territorial limits, the reason of his incapacity ceases to operate, and in justice the incapacity should cease also.

Every nation has a perfect right to establish for itself, its own forms of internal polity, and to determine the state and condition, the civil capacities and incapacities of its own members. Besides these personal laws determining the state and condition of individuals which are founded on natural relations and qualities, and such as are universally recognized among civilized communities; as those of parent and child, those resulting from marriage, from intellectual imbecility and the like, they may, and in point of fact, do establish distinctions, which are not founded in nature, but relate only to the peculiarities of their own social organization, to their own municipal laws, and to the artificial forms of society, which are established among themselves. Now it is freely admitted that other nations are bound by the *jus gentium* to admit the validity of all those personal statutes of other communities establishing such distinctions among their members, whether natural or artificial, to a certain extent. Their validity will be admitted, and they will be enforced by the tribunals of other countries, as to acts which are done, and rights which are acquired within the territorial limits of the community where these laws are established. There they have a legal, and other nations are bound to admit, certainly as a general rule, a rightful authority.

But it is by no means so clear that those personal distinctions which are not founded in nature, and are the result of mere civil institutions, can be allowed to accompany them, and give them personal immunities, or affect them with personal incapacities in other countries in which they may be temporarily resident or transiently passing, whose laws acknowledge no such distinction. The law of the place where a person is for the time being, as to acts done, or rights acquired within that jurisdiction, it would seem, ought to prevail so far as his civil rights depend on his personal status. For these personal statutes establishing distinctions between individuals as to their civil qualities, have a direct relation to public order, and, as is remarked by one of the most eminent living jurists in continental Europe: "Every person who establishes his dwelling in a country, or, it may be added, who is transiently within it, is bound to conform to the measures which the local law prescribes, in the interest of public decorum and good morals." Merlin, Rep. Jur., Effet Retroactif, sect. 3, § 2, art. 5. The observation is applied to the case of a married woman. If by the law of her domicile she is authorized to make valid contracts, and to maintain an action in a court of justice in her own name without the authorization of her husband, and she removes to a country by whose laws this

power is denied to married women, she will not carry with her, into her new residence, the capacity to contract, to plead, and to be impleaded in a court of justice as she is allowed by the law of her domicile, this capacity being denied by the local law, as offensive to good manners. If a person happens to transfer his residence to a country where the same personal distinctions are established, as are allowed in his own domestic forum, it is not intended to be denied, but that the tribunals of this country may allow him his personal immunities or affect him with the personal incapacity of his domicile; but it will, I apprehend, be according to the local law, and not according to the law of his domicile. If a Turkish or Hindoo husband were travelling in this country with his wife, or temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them; but the legal pre-eminence of the husband as to acts done here, would be admitted only to the extent that the marital rights are recognized by our laws, and not as they are recognized by the law of his domicile. If a Roman father, or a father from any country which had adopted the Roman law of paternal power, were travelling in this country with a minor child, we should acknowledge the relation of parent and child, but we should admit, I presume, as a general rule, the exercise of the paternal power no further than as it is authorized by our own law. If a foreigner, in whose country slavery is established, were temporarily resident in Virginia, where slavery also exists, and had brought with him a slave as a servant, a court sitting in Virginia might, I suppose, recognize the relation of master and slave, because that is a relation known to the local law, but it would limit the exercise of the master's authority over his slave, by their own law, and not by the law of the master's domicile.

It is among the first maxims of the *jus gentium* that the legislative power of every nation is confined to its own territorial limits. This is a principle which results directly and necessarily from the independence of nations. Whatever may be the nature of the law, whether it relates purely to persons and their civil qualities, or to things, it can, *proprio vigore*, have no force within the territorial limits of another nation. It follows that the peculiar personal status, as to his capacities or incapacities, which an individual derives from the law of his domicile, and which are imparted only by that law, is suspended when he gets beyond the sphere in which that law is in force. And when he passes into another jurisdiction his personal status becomes immediately affected by a new law, and he has those personal capacities only which the local law allows. The civil capacities and incapacities with which he is affected by the law of his domicile, cannot avail either for his benefit or to his prejudice, any further than as they are coincident with those recognized by the local law, or as that community may, on principles of national comity, choose to adopt the foreign law. Though the civilians, as has been observed, generally hold that the law of the domicile should govern as to the personal status, it is by no means true that they are univer-

sally agreed. Voet, one of the most eminent, of whom it has been said that by his clearness and logic he merits the title of the geometer of jurisprudence, Merlin, Quest. Droit, Confession, sect. 2, note 1, after stating that such is the opinion of the majority, *plurimum opinio*, gives his own opinion in decisive terms, that personal statutes, as well as those relating to things, are limited in their operation to the country by which they are established; and he supports his opinion by the authority of the Roman law, as well as by that plain and obvious axiom of the *jus gentium*, that the legislative power of every government is confined to its own territorial limits. Ad Pand., l. 1, tit. 4, Part 2, n. 5, 7, 8. Gail, who has been styled the Papinian of Germany, maintains the same opinion in terms equally positive. Pract. Obs., l. 8, obs. 122, n. 11.

The inconveniences which would result from a practical adoption of the principle that the law of the domicile must prevail, which determines the personal status of the individual, wherever he may be, would be found to be very great. If we admit that a foreigner has all those personal capacities and civil qualities in this country which the law of his domicile allows, to be consistent and follow out the principle we must adopt all those subsidiary laws of his domicile which regulate and protect him in the enjoyment of his personal status. If, for example, we acknowledge the relation of master and slave, our law should, in consistency, arm the master with the authority to govern his slave, with the power of disposing of his person and labor, which he enjoys by the law of his own country. It would be a mockery to acknowledge the relation of master and slave and to deny all the legal consequences which that relation imports. If we adopt the artificial distinctions of other nations with regard to their subjects, when they are temporarily resident among us, it would seem that we must also adopt that part of their laws which regulates those artificial relations, and the rights and duties which result from them. Natural relations of foreigners, and such as are established by our own domestic institutions, we recognize in foreigners who are temporarily resident among us; but the rights and obligations which flow from them must, as a general rule at least, be determined by our own law, and be enforced by such means only as the local law allows. But those merely artificial distinctions, those capacities and disqualifications of mere positive institution, established by different communities among their members, which are not founded in nature but which relate to their own domestic economy, their municipal institutions, and their peculiar social organization, cannot be admitted to follow them into other nations in whose laws such distinctions are unknown, without disturbing the whole order of society, and introducing into communities privileged castes of persons, each governed to a considerable extent by different laws and affected by personal privileges peculiar to themselves, and totally at variance with the habits, social order, and the laws of the community among whom they reside.

I have thus far considered the subject as it was presented in one branch of the argument, as purely a question of the *jus gentium*, to which the same considerations will apply whether it be raised in one country or another, and I come to the conclusion that the libellant is not disqualified from maintaining an action for a personal tort committed within our jurisdiction, merely because he is by the laws of his own country rendered incapable of maintaining an action in the forum of his domicil. And that conclusion will be fortified by recurring to our own domestic jurisprudence. . . .

The clearest and most distinct recognition of the principle that the civil capacities and incapacities of an individual are to be determined by the law of the place where the person is, and not by that of his domicil, is found in the decisions upon the very subject which is involved in this case — that of slavery. . . . All these cases stand upon the principle that slavery, and with it as a necessary consequence, all the civil incapacities which are peculiar to that servile state, depend entirely on the local law. It follows of course that when a slave passes into a country, by whose laws slavery is not recognized, his civil condition is changed from a state of servitude to that of freedom, and he becomes invested with those civil capacities which the law of the place imparts to all who stand in the same category. It is indeed said, by Chief Justice Shaw, in delivering the opinion of the court, in the case of the *Slave Med* (C. v. Aves, 18 Pick. 193), that “slaves in such case become free, not so much because any alteration is made in their status or condition, as because there is no law which will warrant, but there are laws, if they choose to avail themselves of them, which prohibit their forcible detention, or forcible removal.” If by this is meant there is no change in the personal state of a slave in relation to the law of the country he has left, it may well be admitted to be correct. The law of that country, notwithstanding he is for the time withdrawn from its direct and immediate control, would hold him to be a slave until he acquired his freedom in some of the forms of emancipation known to that law. His mere transit into a country whose law declared him free, within its jurisdictional limits, would not *per se* liberate him from the incapacities and obligations resulting from the law of his domicil within the legitimate sphere of that law’s operation, and if he were to return to that country the condition of servitude would reattach to him precisely as when he left it. So it was decided by Lord Stowell, in the case of the *Slave Grace*, 2 Hagg. Adm. 94, and the same principle is distinctly established by the case of *Williams v. Brown*, 3 B. & P. 69. But it by no means follows that because the law of his domicil holds him to be a slave, he has not, while within a jurisdiction which declares him to be free, all the faculties which belong to a state of freedom. It is difficult to understand what the law does, by declaring him free, if it does not invest him with the rights and capacities of a free man; and if it does, it confers upon him a personal state, very different from that of slavery; and there is no absurdity or contradiction in sup-

posing a man to be a free man in one country and a slave in another. Both result from the same principle; the absolute supremacy of the laws of every state within its own territorial limits. And though Lord Stowell rather sarcastically remarks, that the law of England, by adopting this principle, puts the liberty of a man, as it were, into a parenthesis, it is nothing different from what occurs in many other cases, in which an individual is affected by the law of his domicile with peculiar capacities and disqualifications, which are not recognized either in his favor or against him while resident within another jurisdiction. When he returns to his own country he becomes reinvested with his original personal status and the capacities and disqualifications of the law of his domicile attach. Take a case of familiar and daily occurrence. A man is a magistrate in the place of his domicile. He passes out of that jurisdiction, and he can exercise no authority as a magistrate. He becomes a private person, but on his return to the place of his domicile he reassumes his personal status as a magistrate.

The law which declares a slave free on his introduction into this country, by necessary consequences, if it be not an identical proposition, declares him to be possessed of the civil qualities of a freeman, and confers on him the faculty of vindicating his rights, and claiming redress for wrongs in the ordinary course of justice; and this general proposition is an answer to another part of the argument, that the libellant in this case was put under the government of the respondent who stood *loco domini*, the owner having delegated to him his authority. That authority when the slave was within the jurisdiction of this country, could be exercised only under the restrictions of our law. Years before the decision of *Somerset's case*, it was said by Lord Chancellor Northington, that a negro might maintain an action in England, against his master for ill usage. *Shanley v. Harvey*, 2 Eden, 126, quoted; 2 Hagg. Adm. 116.

It was supposed in the argument that a distinction might be made, founded on the circumstance that the tort was committed on the high seas, which are within the common jurisdiction of all nations. It is true that no nation can claim an exclusive jurisdiction over any part of the high seas, but all nations can, and do claim an exclusive jurisdiction over their own vessels that float on the high seas. A foreigner who is a passenger on board an American vessel, when the vessel has left the port, and is beyond the jurisdiction of his own country, is amenable to the laws of this country and is under their protection. If he commits a crime he may be indicted in our courts, and punished by our laws. If he commits a tort, he is personally liable to answer for it in our courts, and if he suffers a wrong he may appeal to the laws of this country for redress, as much as though the wrong had been done him on land. If the libellant would not be precluded from maintaining an action for a tort done on land, he may equally maintain one for a tort done in an American vessel on the high seas. *Forbes v. Cochrane*, 2 B. & C. 448.

It was supposed at the argument that the capacity of the libellant to maintain this action in the courts of the United States may stand on grounds somewhat different from what it would in the State courts; that slavery existing in some of the individual States and not being prohibited by the constitution and laws of the United States, the national courts might be bound by the principles of the *jus gentium* to recognize the incapacities of slaves having a foreign domicile, even when it would not be done by the State courts, and that the national tribunals are under the same obligations in this respect, whether sitting in a State where slavery is admitted, or where it is prohibited. If this were conceded, and in the view which I take of the case I do not think it necessary to give an opinion upon the question, the answer is, that a court sitting in Louisiana is no more bound than one sitting in Maine, to recognize as to any acts, or rights acquired, within the exclusive jurisdiction of the United States, the artificial incapacities of persons resulting from a foreign law. The question in both cases would be, whether the party could, by the laws of the United States, have a standing in court. The court certainly is not bound to enforce against him a personal incapacity derived from the law of his domicile, because that law can have no force in this country any further than our law on the principles of comity chooses to adopt it; and every nation will judge for itself how far it is consistent with its own interest and policy to extend its comity in this respect. If the legislative power has prescribed no rule, the courts must of necessity decide in such individual case as it is presented, and however embarrassing and perplexing the case may sometimes be, the courts cannot escape them. If the incapacity alleged were slavery, it is not for me to say what would be the judgment of a court sitting within a jurisdiction where slavery is allowed, but sitting as this court does, in a place where slavery by the local law is prohibited, I do not feel myself called upon to allow that disqualification when it is alleged by a wrong-doer, as attaching to the libellant by the laws of a foreign power, for the purpose of withdrawing himself from responsibility for his own wrong.

COMMONWEALTH v. GREEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1822.

[Reported 17 *Massachusetts*, 515.]

PARKER, C. J.¹ The prisoner, having been convicted, by the verdict of a jury, of the crime of murder, at the last term of the court, moved for a new trial; because, as alleged in his motion, one Sylvester Stoddard, who had been sworn as a witness on the part of government, and who had testified to the jury, had been convicted of the crime of

¹ Part of the opinion is omitted. — Ed.

larceny, in a court having jurisdiction of the offence, within the State of New York; whereby, as is alleged, he was rendered infamous, and for that reason his testimony could not be received in a court of justice in this Commonwealth. . . .

If New York is to be considered on the footing of a foreign State, the difficulty of giving such effect to a conviction seems insuperable. The objection to the witness on account of infamy must be supported by a record of the judgment. What is a record of a foreign State, and how it shall be authenticated, are questions of delicacy and difficulty, which it would be almost impossible to settle in the course of a trial, which must always proceed with as little interruption and delay as possible. Whether the facts, which would be here deemed an infamous crime, are the same which constitute the like offence in the country from which the record comes, the court would have no means of knowing with certainty. The crime of treason is known to be different in different countries; what is felony, also, in one country may not be felony in another; and it is competent to the legislature of every nation to attach disabilities to the commission of offences which, by the laws of other nations, may be wholly without such consequences.

Thus one State may enact that the detention of another's property after demand by the owner, shall be deemed and taken to be larceny, and punished as such; and that a general description of the offence, in the indictment, should be sufficient; so that a foreign court could never know, by inspection of a copy of a record, what were the ingredients of the crime which had been punished.

So, also, the non-payment of a debt may be branded with infamy by the laws of any country, and designated by some term usually denoting the *crimen falsi*; and this class of crimes may be enlarged so as to comprehend transactions which in other countries are considered venial, or at least not criminal.

If the common law were unchangeable, the courts of countries which adopt it as part of their code might know with certainty the nature and character of crimes; but while every country has its legislature, which has a right to alter or repeal the common law, such certainty cannot be attained. Treason, by the common law, renders the convict infamous; but many acts are made treason by positive enactments in one country, which would not be so in another. The infamy, therefore, consequent upon treason, ought not to pass beyond the country in which the crime is committed.

Another objection to receiving such evidence for such a purpose is, that a person, who may have left his native country convicted of crime, however long he may have lived in his adopted country, and whatever reputation he may have acquired by a course of upright and honorable conduct, has no means of being restored to credit. For the pardoning power of the country where he resides cannot reach an offence committed without its jurisdiction. And thus it may happen that a naturalized citizen, who, by his virtue and talents, and a long course of

irreproachable conduct, may have obtained the confidence of his fellow-citizens, and even their suffrages for the most important offices, may be met in a court of justice by some obsolete record of a conviction of some crime, perhaps merely political, which may be deemed infamous in the country from which he came; and can have no power of effacing the stain, without soliciting a pardon where he may be wholly forgotten, and where there can be no evidence of such a change of life and manners as would entitle him to the clemency of the offended power.

It is these difficulties, with others which might be mentioned, which justify the principle that appears to be adopted by the English courts; and which we are disposed to think is a maxim of general law, recognized by all nations, viz. that the penal laws of a country do not reach, in their effects, beyond the jurisdiction where they are established. It is so laid down by an eminent judge in the case of *Folliott v. Ogden*, 1 H. Black. 181, and in a treatise of public law by Martens, the same principle is advanced in more extensive and unlimited terms. In the 24th section of his work he says, "The criminal power being confined to the territory, no act of its authority can be exercised in foreign countries without violating their rights." In the 25th section he says, "By the same principles a sentence, which attacks the *honor, rights*, or property of a criminal, cannot extend beyond the limits of the territory of the sovereign who pronounced it. So that he who has been declared infamous in one country is infamous in a foreign country *in fact*, but not in *law*;" which terms the author probably uses in allusion to the civil law, resembling, in some degree, our distinction between competency and credibility. By *infamia juris* is meant infamy established by law as the consequence of crime; *infamia facti* is where the party is supposed to be guilty of such crime, but it has not been judicially proved. "And the confiscation of his property cannot affect his property situated in a foreign country. To deprive him of his honor and property judicially there also, would be to punish him a second time for the offence." To refuse a man the right to be a witness on account of a conviction in another country, would be to suffer that conviction to have force here, and, in some measure, to carry it into execution.

If it be said that it will be dangerous to the lives and reputations of the citizens, that foreigners, who have been rendered infamous abroad, should be admitted to testify against them, the answer is, that their former condition and character may be made known to the jury to enable them to judge of their credibility; and this without depriving them of any valuable personal right by reason of their conviction abroad. Their right to stand in court as *probi et legales homines* is sustained; but as all other men, the value of the testimony is to be estimated by their general reputation, and even by the proof of particular facts showing a conviction and punishment for crime; and the effect of such proof may be always rebutted by evidence of good conduct, a virtuous life, etc.

Infamy is, in truth, part of the punishment of the *crimen falsi*,

although not expressed in the sentence ; and it creates a disability to testify, just as excommunication in a spiritual court does to sue in the courts of common law. To hold a person incompetent on account of such a conviction, is to give effect to the conviction, and to enforce the punishment ; and thus the penal laws of one country would reach into others, contrary to the principle above stated.

It would seem to be consistent with sound principles also that, wherever there is a crime or punishment remaining in force, there should be a power of pardon ; but the act of pardon cannot operate upon an offence committed under another jurisdiction ; nor can it extend beyond the jurisdiction of the offended sovereign. So that one who has once exposed himself to a punishment which renders him infamous in the country where the offence was committed, must be perpetually stigmatized if he remove into another country. This is sufficient to show the reasonableness of limiting the penal effects of crime to the country whose laws have been violated.

We do not find, after a careful examination, as well by the counsel for the prisoners, as by ourselves, that the question before us has arisen in the English courts, or in those of any of the United States. All the cases in the English books in which objections were made to the competency of witnesses on the ground of infamy, seem very clearly to have been cases of conviction in some of their own courts. Indeed the strictness of the rule under which such evidence is admitted, seems almost necessarily to exclude conviction in any foreign court. The objector must have the record in his hands, and must show not only a conviction, but a judgment thereon. We think the silence of the English books on this subject, even among the multitude of treatises on evidence, which have lately issued from the press, furnishes strong reasons to believe that objections of this nature, if heard at all, only go to the credibility of witnesses.

The only book we have seen which intimates a different doctrine is one upon the principles of evidence, by a Mr. Glassford of Scotland, referred to in the argument for the prisoner ; a respectable writer, but hitherto unknown to the courts of law in this country. Speaking of incompetency by reason of infamy, he inquires into the proof necessary to establish the fact ; and supposes that an exemplification of a record, from England or Ireland, would be received as proof in Scotland. How far the peculiar organization of the Scotch courts, and the system of rules by which they are governed, may have had an effect on their law of evidence, we cannot know ; nor whether the circumstance, that the three countries are under one sovereign, and one legislative power, may not have had its effects. The examples produced by the writer are from England and Ireland only ; and from this it would seem that his doctrine would not apply to the records of a country strictly foreign. Indeed such records cannot properly be exemplified ; but must be proved by testimony, as other facts are proved.

But it has been argued by the counsel for the prisoner, that, although

a conviction in a court of a country strictly foreign, should not be held to take away the competency of a witness, yet that such is the relation of the several States which compose the American Union with each other, that the same law ought not to prevail here, as the States are not in fact foreign to each other. . . .

We have come to the opinion that there is no difference in the effect of a conviction, in regard to the competency of a witness, between any State in this Union and any foreign State; and that in neither case is the witness to be excluded on account of such conviction.¹

KYNNAIRD v. LESLIE.

COMMON PLEAS. 1866.

[*Reported Law Reports, 1 Common Pleas, 389.*]

THIS was an action of ejectment brought to try the right to certain estates in Northumberland. The case was tried before ERLE, C. J., at the sittings in Middlesex, after last Trinity Term, when it appeared that the estates in question had been granted by the Crown to Anthony James, Earl of Newburgh, in 1798. He died in 1814, and by his will devised the estates to his wife for life, with remainder, after several intermediate estates, which did not take effect, to his own right heirs. At his death, his heir, unless prevented from taking by the attainder of Charles Ratelyffe, the testator's grandfather, who was attainted of treason in 1716, and whose marriage took place abroad subsequently to that event, was admitted to have been Francis Eyre, the younger.

ERLE, C. J.² I am of opinion that the defendant is entitled to our judgment. The action is one of ejectment, and the plaintiff must make out his own title in order to succeed; it is not, however, necessary to go into that title here further than to say that it is admitted that Francis Eyre, the younger, through whom the defendant claims, became entitled to the property on the death of the testator, unless his title was defeated by his having to claim through a common ancestor who was attainted before his marriage, or unless the marriage of that common ancestor was void. . . . Was the marriage of Charles Ratelyffe null? I can find no authority for this in our law: it would be a most revolting conclusion to come to, that the marriage of a man, who was capable of contracting in the land in which he was living, with a woman who was born and brought up in that land, and who

¹ *Acc. Sims v. Sims*, 75 N. Y. 466; *C. v. Hanlon*, 3 Brewst. 461 (*semble*). *Contra*, *Clark v. Hall*, 2 H. & M'H. 378 (*semble*); *S. v. Foley*, 15 Nev. 64; *Chase v. Blodgett*, 10 N. H. 24; *S. v. Candler*, 3 Hawks, 393. See *Campbell v. S.*, 23 Ala. 44; *Klein v. Dinkgrave*, 4 La. Ann. 540; *Uhl v. C.*, 6 Grat. 706. — Ed.

² Part of the statement of facts, the arguments, and parts of the opinions, involving the discussion of another point, are omitted. — Ed.

might even have been ignorant of her husband's attainder, was invalid, and their children illegitimate, because the man had been attainted before he went abroad. If such were the law, I should not shrink from enforcing it, but I believe it is not the law of our land, though it is said to be the law of France.

WILLES, J. . . . The only remaining question is, whether the marriage of an attainted person is valid. Whatever question there may be, if the marriage is contracted in this country, I think that where the marriage has been contracted abroad, by an innocent woman who may not even have known of the attainder of the person she was marrying, the rule, according to which the *lex loci*, with some exceptions founded on public policy, governs contracts, must prevail. But further, I think that the marriage, even if it had taken place in England, would have been valid. If we consider how attainder affects persons already married, upon what grounds, previously to the Divorce Act, could a marriage have been dissolved? Only by divorce for a cause existing at the time of the marriage, or natural death. There are many instances of persons who have been attainted returning upon a commutation of their sentence to their wives. The capacity for the matrimonial state, therefore, is not destroyed. Moreover, an attainted person is not incapable of contracting though he cannot pray in aid the King's courts to enforce his contracts. He can contract with those whose consciences bind them to fulfil their engagements, and he can take a grant, and grant to others even the inheritance which on office found would escheat to the Crown; and the rights so acquired by third parties may be the subject of actions in Her Majesty's courts. His contracts, too, can be enforced against him, and he cannot set up the disability arising from his own attainder. Further, I apprehend, any rule with respect to the validity of the marriage would only render it voidable, not void, unless the penalty that it should be void is actually fixed by law. This is the case, apart from statute, with other impediments, where there is a capacity and lawful authority to marry, though the marriage may be dissolved by a competent court during the lifetime of both the parties. The dictum referred to in Co. Litt. 133 *a* is merely metaphorical, and is so treated by Lord Coke. Reference has been made to the difference between the effects of civil death under the Code Napoléon and our own law. There is not only the distinction that by the former civil death produces *ipso facto* a divorce, but it is also expressly declared that the marriage of a person civilly dead shall not imply any civil rights; that is said to apply to a marriage out of France as well as to one in it; such a law is wholly foreign to our system, there are no two kinds of marriage in England, there is no such thing as a marriage without civil rights. For anything analogous to the French law, we must look to the marriages which under Roman jurisprudence were contracted between those who had not the right of Roman marriage, as two slaves, or a freedman and a slave. The only other instance of such secondary marriages are the morganatic marriages in Germany;

and there, though the children of the marriage can claim none of their father's rights, yet they are legitimate members of their mother's family, and as such can inherit from one another. I protest against the idea that there can be any such marriages in England, or that the children of a person marrying after his attainder are other than legitimate; but if such marriages did exist, no doubt they would be accompanied by a similar provision to that found in Germany.

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule discharged.

WILSON v. KING.

SUPREME COURT OF ARKANSAS. 1894.

[*Reported 59 Arkansas, 32.*]

BATTLE, J.¹ In *Pillow v. King*, lately pending in this court, John Farmer executed a bond to stay proceedings on the decree appealed from in that case. He was afterwards released, on his application, from further liability, and S. C. Wilson executed another bond, in the sum of \$3,500, for the same purpose, which was filed with and approved by the clerk of this court. The condition and effect of the bond was as provided by section 1295 of Mansfield's Digest.

The decree which was appealed from in *Pillow v. King* was affirmed by this court, and King brought this action on the bond of Wilson to recover the damages he suffered during the pendency of the appeal by reason of being deprived of the use of the lands and other property, to the possession of which he was entitled under the decree affirmed, which he alleges exceeded the amount of the bond sued on. The defendant answered and alleged as follows:—

First. That King was incompetent to sue, “because he was civilly dead, having been found guilty . . . of murder in the first degree and been sentenced to death in Shelby County, Tenn.” . . .

The jury returned a verdict in favor of the plaintiff for \$3,500, and judgment was rendered accordingly.

First. The conviction and sentence of King in the State of Tennessee did and does not affect his right to sue and recover in this State. Story on the Conflict of Laws (8th ed.), §§ 619–625. . . .

Judgment affirmed.

¹ Part of the opinion is omitted. — ED.

MAROTTE v. GRIFFON.

COURT OF CASSATION, FRANCE. 1808.

[Reported 10 Merlin's Répertoire, 563.]

IN 1794, after the second entry of the French army into the country of Liège, Marie Rosalie Philippine Marotte, domiciled at Yeneux, withdrew with her mother beyond the Rhine. On March 16, 1796, she married before the curé of Wittenberg, Pierre Griffon of La Rochelle, who was entered upon the list of émigrés of the department of Lower Charente, under date of June 26, 1792. After living with him a month, she left him and returned to Belgium, her native country. Being summoned before the military commission of Brussels as a returned émigré, she proved that she was not the Miss Marotte whose name was entered upon the list of émigrés, and thus obtained on the 8th Germinal, year VI, a judgment which acquitted and freed her. Hereupon she undertook the management of her property, and acted and contracted without dispute as an adult unmarried woman.

On the 16th Pluviose, year XI, Pierre Griffon obtained, by virtue of the *senatus-consultum* of the 6th Floreal, year X, a writ of amnesty which authorized him to return to France and restored him to all his rights as citizen. Armed with this writ, he removed to the department of Ourthe, and delivered, as husband of Miss Marotte, formal demands to all her tenants and debtors. Miss Marotte, also granted amnesty by a writ of the 26th Pluviose, year XI, cited him before the Tribunal of First Instance of Liège, to have the pretended marriage contracted between them in Germany, March 16, 1796, declared null.

On 20th Pluviose, year XII, judgment by default declared her not entitled to bring suit for nullity of said marriage; ordered her to return to Griffon; and authorized him to exercise the power of the law to compel her to do so.

Miss Marotte appealed from this judgment, and on the third Messidor, year XIII, the Court of Appeal of Liège delivered the following judgment:—

“It is agreed that the parties were married by the curé of Wittenberg, where they were living, and that all forms required in that country for the validity of marriages were observed. The defendant therefore legally acquired the position of husband of the appellant, and she voluntarily consented to become his wife, a position which she recognized after her return to her country, the former Belgium. The *senatus-consultum* of 6th Floreal, year X, permitting émigrés to return to France, and restoring to them all rights as citizens, should necessarily permit them to enter their old country with all the qualities and powers which they had legally acquired elsewhere, provided these qualities were not opposed to the existing laws at the time of the return. It follows that the defendant, in obtaining permission to return

to France, has also obtained the right to enter in the quality of married man which he had acquired. The effects of the civil death with which the émigrés were affected during their absence can apply only to the exercise of political or purely civil rights, and to all that concerns the interests of the Republic. It would be contrary to principle to conclude that émigrés would be incapable of entering outside of France into contracts founded on the law of nature and of nations, like the contract of marriage. Furthermore, Art. 4 of § 1 of the law of September 20, 1792, provides that emigration shall not of itself effect a dissolution of marriage, but offers to the spouse who has remained a sufficient ground for obtaining a divorce. Consequently if an old marriage continues, that contracted during the emigration should be declared valid: because in both cases this contract is entered into by the free will of the parties; and in the latter case there is no fault on either side, while in the former the spouse who remains in France may impute to the other an act which the law regards as a crime.

“The court dismisses the appeal, declares the marriage in question good and valid, and the suit for nullity ill-founded, and condemns the appellant to pay costs.”

The plaintiff appealed to the Court of Cassation.¹

THE COURT. Article 1 of the law of March 28, 1793, Article 1 of that of 12th Ventose, year VIII, and Article 15 of the *senatus-consultum* of 6th Floreal, year X, have been examined.

Article 7 of Title 2 of the Constitutional Act of September 3, 1791, provides that marriage shall be considered only as a civil contract; Article 3 of the law of March 28, 1793, declares émigrés civilly dead, and Article 1 of the law of 12th Ventose, year VIII, provides that émigrés cannot invoke the civil law of the French; and the parties have not denied their enrolment on the list of émigrés.

It is contrary to the nature of things that those condemned to civil death should contract such a marriage as shall have an effect on legal relations, as indicated in Article 25 of the Civil Code;² and it necessarily follows that the marriage in question, contracted while the parties were both in a state of civil death, was null and void from the beginning; and that the recognition of the marriage by the appellant while both parties continued in a state of civil death, could have no greater effect than the marriage itself, contracted in that state.

It is provided by Article 15 of the *senatus-consultum* of 6th Floreal, year X, that émigrés granted amnesty should be regarded as restored to their rights as citizens from that day only; this is confirmed by the opinion of the Council of State of 18th Fructidor, year XIII, to the effect that Article 15 of the *senatus-consultum* might well regard as valid marriages and other civil contracts of the émigrés made *after* the *senatus-consultum*.

¹ The arguments of counsel are omitted. — Ed.

² “One civilly dead is incapable of contracting any marriage which can produce civil effects. A marriage which he may have previously contracted is dissolved as to its civil effects.” — Ed.

Whence it follows that the judgment of 5th Messidor, year XIII, declaring the marriage in question valid, has contravened the laws of March 28 and 12th Ventose, year VIII, and has misapplied the *senatus-consultum* of 6th Floreal, year X.

Judgment quashed.

IN RE BLANCHARD.

COURT OF CASSATION, FRANCE. 1868.

[*Reported Dalloz*, 1868, 1, 262; *Sirey*, 1868, 1, 183.]

THE COURT. By the terms of Article 2123 of the Code Napoléon, and 546 of the Code of Procedure, judgments of foreign courts can produce no effect in France. This rule, which is only the consequence of the principle of the sovereignty of each State within its own territory, and of the protection which a State owes its subjects, is applicable to judgments rendered in criminal and correctional as well as in civil suits; and it has been correctly held, in consequence, that punishment for a second offence can only be inflicted where the former conviction was in a French court.¹ According to Article 7 of the Code of Criminal Procedure of 1808, re-enacted and extended to misdemeanors by the law of June 27, 1866, no prosecution can be instituted in France against a Frenchman by reason of crimes or misdemeanors committed by him abroad, when the accused shows that he has already been convicted abroad for the same act; and if the French law in this connection gives a certain force to the foreign judgment in France, this exception to the general rule, founded as it is on considerations of humanity which do not permit a man to be judged twice for the same act, should not be extended beyond the special case which it was created to meet. And though this purely negative effect attached to a foreign judgment may be regarded as derived from the principle of *res judicata* or *non bis in idem*, one cannot infer that it should produce all the effects of *res judicata* annexed by our law to the decisions of French courts; for instance, that it should result in the deprivation of the electoral franchise which Article 15 of the organic decree of Feb. 2, 1852, makes the result of certain specified convictions. In the first place, it seems clear that Article 15 has had in view only the convictions pronounced by French courts, and not the quite exceptional case of a conviction pronounced by a foreign court; since if the legislator wished electoral incapacity to result from the judgments of a foreign court he would have explicitly said so, as he did with regard to bankruptcy, in section 17 of the same Article 15, but only on condition that the foreign judgment should be

¹ *Acc.* 16 Clunet, 663 (Nancy, 11 Apr. '89); 18 Clunet, 981 (German R. G. 7 July, '90.)—ED.

made executory in France, which makes the case an exception to the general rule. In the second case, it would be extraordinary if a foreign power could deprive a Frenchman of his rights as a citizen, and thus influence the composition of the body of electors.

From the foregoing it follows that in deciding that condemnation to fifteen years' imprisonment for theft pronounced on Nov. 5, 1866, by the Belgian tribunal of Charleroi against the appellant, would create the incapacity defined in Article 15, section 5, of the decree of Feb. 2, 1852, and in consequently refusing to place his name on the list of electors of the commune of Etreux, the judgment appealed from has falsely applied said article, as well as Article 5 of the Code of Criminal Procedure, and has formally violated the principle of public law declared in Article 546 of the Code of Civil Procedure and Article 2123 of the Code Napoléon. The judgment of the Justice of the Peace of the Canton of Wasigny, dated Feb. 24, 1868, is

*Quashed and annulled.*¹

AFFAIR OF NIKITCHENKOW.

SENATE OF RUSSIA. 1868.

[*Reported 1 Clunet, 47.*]

ACCORDING to the laws of Russia a condemnation to hard labor involves the loss of civil rights, including family rights and rights of property; it gives the spouse a right to demand a divorce; the convict loses all his property, both real and personal; his succession is opened from the day judgment is pronounced. In 1868, Alexander Nikitchenkow was condemned, at Paris, to hard labor; the Minister of the Interior referred to this court the question of his rights of property.

THE SENATE. Lieutenant Nikitchenkow was prosecuted in the Court of Assizes of the Seine, and the jury declared him guilty of attempt to murder Batsch, Savoie, and Piccolo, with extenuating circumstances; the attempt failed from causes independent of the will of the accused. The court condemned him to imprisonment with hard labor for life. This crime is punished by the Russian Code with hard labor and the loss of all civil rights, with the consequences provided by Article 25 of the Penal Code.²

¹ *Acc. 8 Clunet, 440* (Turin, 14 Dec. '78). So a foreign conviction does not operate, like a domestic conviction, to exclude from the militia: *5 Clunet, 518* (Cass. Belg., 26 Dec. '76); or to forfeit a pension: *18 Clunet, 1016* (Denmark, 13 Jan. '89).

² "The consequences of condemnation to hard labor are loss of family and property rights. At the expiration of the term of imprisonment, he is banished for life to Siberia."

Though in our laws it is not provided that a judgment rendered by a foreign court against a Russian subject who has committed a crime abroad should have executory force in Russia, yet such a judgment should not be regarded as without force; otherwise (in contradiction to Art. 22 of the Code of Criminal Procedure) the accused might be convicted a second time under the Russian Penal Code, for a crime already punished abroad according to the laws of the country where the crime was committed.

We therefore hold, in conformity with the opinions of the Ministers of Justice and of the Interior, that the property of Lieutenant Nikitchenkow, situated in Russia, should be subjected to the consequences of Articles 25 and 28 of the Russian Penal Code.

THOMAS v. GARDET.

COURT OF CASSATION, FRANCE. 1885.

[*Reported Journal du Palais*, 1886, 284.]

IN 1853 Ambroise Gardet, then less than eighteen years old, was prosecuted in the Court of Chambéry as an accessory to theft of chestnuts, a crime punished by imprisonment from three months to a year, according to the Sardinian law. Found guilty, he was, by virtue of a special provision of the Sardinian law, declared punished enough by the imprisonment already suffered. In spite of this condemnation, he had always been placed upon the voting-list since the annexation of Savoy to France. In 1885 M. Thomas demanded that his name be stricken off the list, because of the condemnation, according to Article 15, section 5, of the decree of February 2, 1852. This demand was rejected by the municipal commission. On appeal, the justice of the peace of Chamoux sustained the rejection for the following reasons: 1st, the decree of 1852 applied only to those guilty of theft as principals, not to accessories; 2d, Gardet's punishment having consisted merely of detention before conviction, he had not suffered the punishment of imprisonment for theft; 3d, incapacity to vote, being a merely ancillary punishment, must fail if the principal punishment did not exist; 4th, the condemnation had been pronounced by a foreign court.¹

Error was brought by Thomas, who in four assignments of error asserted that each of the grounds of judgment constituted a violation of law.

THE COURT. It is a rule of law that condemnations of crime by foreign courts are without effect in France; but there is an exception

¹ Only so much of the opinion as deals with the fourth assignment of error is given. — ED.

where the country in which the sentence was imposed is afterwards annexed to the territory of France. The two sovereignties then become one; the court in which sentence was given is regarded, by a legal fiction, as always having been French, and its decision should therefore produce all the effects which it would have according to the law of France. On the other hand the foreigner, in becoming French, acquires all the rights dependent on this quality; but he can exercise them only if he fulfils all the conditions to which their enjoyment is subject, and consequently only if there is no cause of personal disqualification. Since in rejecting the appeal the judgment of the court below is based on a contrary principle, it has violated the law.

*Judgment quashed.*¹

MARTEL v. REYNAUD.

CIVIL TRIBUNAL OF GAP. 1892.

[*Reported 19 Clunet*, 951.]

By judgment of the Court of Assizes of the High-Alps, dated June 19, 1891, Clapier was condemned to five years at hard labor; and by Article 29 of the Penal Code the convict during this term is in a status of legal interdiction. But since Clapier is an Italian subject, and Article 32 of the new Italian Penal Code provides that legal interdiction shall result from a condemnation to more than five years' imprisonment or *ergastoli*, M. Martel, who was appointed Clapier's guardian by family counsel, on August 29, 1892, claims that Clapier is not legally interdicted, and that Reynaud, who is suing for damages, should not have made Martel defendant in a French court, but Clapier himself.

The principle is not denied that laws regulating the capacity and status of foreigners follow them into France; that they preserve their force and effect everywhere; and that legal interdiction, not being a penal matter, governs the status and capacity of the person, which depend upon the statute personal. It follows that Clapier, being an Italian subject, though condemned in France to a punishment of five years' hard labor, is not in a status of legal interdiction, since the Italian law creates this status only upon a punishment exceeding five years. Since he has every capacity for standing in justice, Reynaud should have sued him personally. . . .

Proceedings declared null.

¹ See, however, *Giribaldi's Case*, 3 *Clunet*, 185 (Aix, 14 Apr. '75). — ED.

WORMS v. DE VALDOR.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1880.

[*Reported 49 Law Journal, New Series, Chancery, 261.*]

THIS was an action for the delivery up and cancellation of certain bills of exchange accepted by the plaintiff, a French subject in France.

Objections were taken in the several statements of defence that the plaintiff, by French law, was incapacitated from suing without the intervention of his "Conseil Judiciaire," by reason of his having been adjudicated a "prodigal," and placed under a "Conseil de Famille" by the Tribunal of First Instance of the department of the Seine, the duly authorized court in France for that purpose.¹

FRY, J. The first objection which has been raised to the plaintiff's case is founded upon the fact that some time prior to the date of the bills of exchange he had been placed under that proceeding of the French law which is known as "Conseil de Famille," and it is said that that fact prevents his being able to sue in this court. That argument is based upon the 13th section of the Code Civil, which prevents "prodigals," among other things, from pleading without the assistance of counsel, who may be assigned by the court. I declined to stop the case on that preliminary objection, inclining to the view that if a change of status were effected by an order of a French court, this court would not take notice of a personal disqualification caused by such change of status. Assuming the proposition to be true that a personal disqualification was introduced by the judgment of the French court, I still adhere to that view, and I read a passage from Mr. Justice Story's "Conflict of Laws" (§ 104) as expressing the view I entertain: "Personal disqualifications not arising from the Law of Nature, but from the principles of the customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarded in other countries where the like disqualifications do not exist; hence the disqualification resulting from heresy, excommunication, Popish recusancy, infamy, and other penal disabilities, are not enforced in any other country except that in which they originate. They are strictly territorial, so the state of slavery will not be recognized in any country where institutions and policy prohibit slavery." The learned author might have gone further with respect to slavery, for it is well known that in the celebrated case of *Somerset*, 20 Howell's State Trials, 1, the courts of this country, where villenage has never been abolished, declined to recognize the status of slavery resulting from the legislation of any other country.

It appears to me, however, that upon the point which is left for me to decide without the assistance of any French lawyers, that a part of the proceedings referred to was not to change the status of the plaintiff.

¹ Arguments of counsel are omitted. — ED.

According to French jurisprudence, before the passing of the Code Napoléon, prodigality was one of the grounds which is known as interdiction: such interdiction as was passed in the case of a lunatic, for instance. But by the code matters were altered in that respect, and an interdict cannot now be passed against a person on the ground of prodigality. I find this laid down in Toullier's work on French law (2 Le Droit Civil Français, 5th ed. 443): "L'ancienne jurisprudence avait mis la prodigalité au nombre des causes qui pouvaient faire interdire un majeur; mais le Code n'en admet plus d'autres que l'état habituel d'imbécillité de démence ou de fureur." Then he says (Ib. 476): "À la différence de l'interdiction qui opère un véritable changement d'état, la nomination d'un conseil judiciaire n'en opère aucun dans la personne qui s'y trouve soumise; elle continue d'exercer par elle-même toutes ses actions, tous ses droits civils et politiques de voter dans les assemblées de famille et dans les assemblées primaires et électorales, de faire, en un mot, tous les actes de la vie civile: elle est seulement assujettie à prendre pour certains actes d'exception l'avis du conseil, qui doit la prémunir contre les erreurs et les surprises auxquelles elle est exposée dans la disposition des ses biens ou dans la direction de ses affaires." There being, therefore, no change of status but merely a requirement of French law in particular cases, it appears to me that that does not prevent the plaintiff in this case from suing in this action.

GATES v. BINGHAM.

SUPREME COURT OF ERRORS, CONNECTICUT. 1881.

[*Reported 49 Connecticut, 275.*]

ASSUMPSIT for the rent of a house, brought to the Court of Common Pleas, and tried to the court, on the general issue with notice, before MATHER, J. The following facts were found by the court:—

In 1871 Charles M. Pendleton was appointed by the court of probate for the district of Norwich in this State, conservator of the defendant, who was then a resident of the town of Norwich; the court finding that by reason of improvidence and prodigality he had become incapable of managing his affairs. Bingham was at that time twenty-three years of age. Pendleton duly qualified as conservator and has never been removed. . . . In December, 1876, the defendant married in Worcester, and at that time hired of the plaintiff a tenement there, at the rate of fifteen dollars a month, payable at the end of every month, where he resided with his wife till October 13, 1877.

The defendant paid the rent of this tenement until the 15th of July, 1877, but the rent from that time until October 13 has never been paid, and for the recovery of it this suit is brought. The tenement

was a suitable one for himself and family, and the rent reasonable, and the defendant and his family during the time were not otherwise provided with lodging. His conservator knew that he had hired a tenement of the plaintiff, and sent money to the defendant at times to pay the rent. The plaintiff was informed by the defendant that he had a conservator.

The defendant requested the court to rule that his disability by reason of the appointment of a conservator followed and was attached to his person; and that to render him liable in this suit, the same approval of the contract by the conservator would be required as would have been necessary if he had continued to reside in this State. The court refused so to rule; but ruled that the law of the place where the contract was made should govern, and that the disability of the defendant, by reason of the conservatorship, only continued while he resided within the jurisdiction of this State.

Upon these facts the court rendered judgment for the plaintiff. The defendant brought the record before this court by a motion in error.¹

GRANGER, J. There is clearly no error in the charge. The disability under which one is placed, with regard to his power to make contracts, by having a conservator appointed over him, is created wholly by statute, and can have no operation where the statute does not operate. It is a well settled principle that no statute can operate beyond the territorial limits of the State in which it was enacted. While the defendant was residing in the State of Massachusetts he was *sui juris*, and if incapable of managing his own affairs the only mode of securing a legal supervision for him was by proceeding under the laws of that State in the same manner as in the case of any other of its inhabitants. The defendant had in fact become an inhabitant and citizen of that State, and had ceased to be a citizen of Connecticut.

It does not affect the case that the suit is brought in this State. The contract upon which it is brought, being a valid and binding one in the State where it was made, is equally valid and binding in this State.

It cannot affect the case that the plaintiff knew that the defendant was under a conservator in Connecticut. Since he was legally free from the control of the conservator in Massachusetts, the fact that he had previously been under a conservator in this State was of no importance.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

¹ Part of the statement of facts and the arguments are omitted. — ED.

STATE TO USE OF GILBREATH *v.* BUNCE.

SUPREME COURT OF MISSOURI. 1866.

[*Reported 65 Missouri, 349.*]

SHERWOOD, C. J. Suit upon the defendant's bond as curator of the estate of the relator. The petition avers that the relator, Willie Gilbreath, is an infant, under the age of twenty-one years, and is now a resident of Washington County, in the State of Arkansas, and that Bunce is the curator of his estate, acting under appointment of the probate court of Cooper County, Missouri, and has in his hands, as curator, notes and money amounting to the sum of two thousand dollars; that the General Assembly of the State of Arkansas by an act approved February 18, 1869, entitled "An act to confer upon the probate and circuit courts of the State of Arkansas certain powers for removing legal disabilities of minors;" empowered the several probate courts of the State to authorize any person who is a resident within their jurisdiction, and who is under twenty-one years of age, to transact business in general, or any particular business specified, in like manner and with like effect as if the act or thing was done by a person above that age, and that such act should have the same force and effect as if done by a person of full age; that in pursuance of said act the probate court of Washington County, Arkansas, at its September term, 1875, ordered and adjudged that the disability of non-age of said Willie Gilbreath be removed, "so far as to authorize him to demand, sue for, and receive all moneys belonging to him in the State of Missouri, in the hands of his curator or any other person, and to execute releases therefor in the same manner as if he was of full age;" that by virtue of said act and judgment the legal disability of non-age was removed so far as to authorize him to demand, sue for, and receive all money belonging to him in the hands of his curator in the State of Missouri. The petition then sets out the bond of defendant Bunce, as curator, and for breach thereof, alleges the refusal of Bunce to pay over the money upon demand, and asks judgment for the amount in his hands. The suit is prosecuted by plaintiff in his own name and he appears thereto by attorney.

The defendants demurred to this petition, alleging as grounds thereof, that the petition showed upon its face that Willie Gilbreath was an infant under twenty-one years of age, and that he could not prosecute this suit by attorney, but must do so by next friend; that it also showed that Bunce was lawfully possessed of the money, and therefore stated no cause of action; that the act of the legislature and the order of the probate court of Arkansas was of no validity in this State, and could not affect the property under Bunce's control; and lastly, because the petition stated no cause of action. The petition was held insufficient, final judgment entered for defendant, and the case comes

here by writ of error. The demurrer was well taken in that the petition showed upon its face that the party to whose use this suit is brought, is an infant under the age of twenty-one years, and does not appear by guardian in conformity to statutory regulation. Wag. Stat., § 6, p. 1014, Ib. § 1, *et seq.*, p. 1003; *Higgins v. R. R. Co.*, 36 Mo. 419; *Jones v. Steele*; Ib. 324; *Copeland v. Yoakum*, 38 Mo. 349. But the demurrer was well taken for a far weightier reason, a reason going to the very foundation of the suit. The legislature of Arkansas did not possess the power to pass a law to override and control our laws; no more could it authorize the probate court of Washington County to do this. *Smith v. McCutchen*, 38 Mo. 415; Story on Con. of Laws, §§ 539, 18, 103. Our own statutes (1 Wag. Stat., § 1, p. 672, and § 48, p. 681) provide when infants shall attain their majority, and they must be our guide, and not the laws that emanate from a foreign jurisdiction. Judgment affirmed. All concur.

Affirmed.

FAY v. OPPENHEIM.

CIVIL TRIBUNAL OF THE SEINE. 1889.

[Reported 17 *Clunet*, 870.]

THE TRIBUNAL. Fay & Co., English merchants, ask an *exequatur* for a judgment, rendered March 13, 1888, by the English Court of Queen's Bench, in their favor against Felix Oppenheim for 11,069 francs 30 centimes, balance of a charge of 15,872 francs for furnishings and repairs for a yacht. Oppenheim and his guardian (*conseil judiciaire*), Robert Esser, solicitor of the Tribunal of Bergheim, resisted the application. He alleges that the judgment of March 13, 1888, is null, so far as he is concerned (1) because his guardian was not made a party; (2) because the obligation he entered into with Fay is null, since it was more than a mere routine act.

As to the nullity of the judgment: the law of statute personal which governs the status of a citizen follows him abroad. Oppenheim, a German by birth, was placed under guardianship by a judgment of the Tribunal of Bergheim on January 6, 1881; this judgment has the same effect upon the capacity of the prodigal as proceedings under Art. 513 of the Civil Code have in the case of a Frenchman. It follows that Oppenheim can have no standing in any court whatever without his guardian, and a judgment rendered against him without making his guardian a party is therefore null.

It is objected that the English law does not recognize the special incapacity which results from prodigality, and that the English judgment of March 13, 1888, being regular and in conformity with English law, should be made executory; since as the question concerns for-

eigners only, it cannot involve any principle of French law. But the French courts are bound to respect the laws of general public order. A law relative to the capacity of persons is one of public order; the Tribunal should therefore inquire whether a foreigner condemned by a foreign court was defended in the court in accordance with the rules which govern his capacity. Supposing the English law does not recognize the special incapacity of prodigality, it does not appear that it would be impossible to join the guardian of a foreign defendant as a party in the English court; but at any rate, since it is the question of issuing execution in France, the French court should inquire whether the foreign decision satisfies all conditions which the French law regards as of public order. It follows that since Oppenheim was not joined with his guardian as party in the English court, the judgment of March 13, 1888, should not be executed in France.

The Tribunal of the Seine might, it is true, pass upon the merits of a suit against Oppenheim, joined with his guardian; but such a demand does not appear either in the allegations or in the prayers of this complaint; the prayer for damages being merely accessory to the demand for an *exequatur*.

For these reasons, John Fay & Co. cannot maintain this demand for an *exequatur*. The application is dismissed with costs.

SECTION II.

MARRIAGE.

HYDE v. HYDE.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. 1866.

[*Reported Law Reports, 1 Probate and Divorce, 130.*]

LORD PENZANCE, Judge Ordinary. The petitioner in this case claims a dissolution of his marriage on the ground of the adultery of his wife. The alleged marriage was contracted at Utah, in the territories of the United States of America, and the petitioner and the respondent both professed the faith of the Mormons at the time. The petitioner has since quitted Utah, and abandoned the faith, but the respondent has not. After the petitioner had left Utah, the respondent was divorced from him, apparently in accordance with the law obtaining among the Mormons, and has since taken another husband. This is the adultery complained of.

Before the petitioner could obtain the relief he seeks some matters would have to be made clear and others explained. The marriage, as it is called, would have to be established as binding by the *lex loci*, the divorce would have to be determined void, and the petitioner's conduct

in wilfully separating himself from his wife would have to be accounted for. But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered "husband" and "wife" in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this court cannot properly exercise any jurisdiction over such unions.

Marriage has been well said to be something more than a contract, either religious or civil — to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognized one throughout Christendom: the laws of all Christian nations throw about this status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms — countries in which this institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian "wife." In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things — laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word "wife." But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognize and intend by the words "husband" or "wife," but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer. The language of Lord Brougham, in *Warrender v. Warrender*, 2 Cl. & F. 531, is very appropriate to these considerations: "If, indeed, there go two things under one and the same name in different countries — if

that which is called marriage is of a different nature in each — there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore, all that the courts of one country have to determine is whether or not the thing called marriage — that known relation of persons, that relation which those courts are acquainted with, and know how to deal with — has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer." "Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such nature as that it is capable of being followed by, and subsisting with, another, polygamy being there the essence of the contract."

Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce; and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one third of his income. If these and the like provisions and remedies were applied to polygamous unions, the court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence. For it would be quite unjust and almost absurd to visit a man who, among a polygamous community, had married two women, with divorce from the first woman,

on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriages, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers.

If, then, the provisions adapted to our matrimonial system are not applicable to such a union as the present, is there any other to which the court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex.

This is hardly denied in argument, but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; that this court will be justified in treating such first union as a Christian marriage, and all subsequent unions, if any, as void; the first woman taken to wife as a "wife" in the sense intended by the Divorce Act, and all the rest as concubines. The inconsistencies that would flow from an attempt of this sort are startling enough. Under the provisions of the Divorce Acts the duty of cohabitation is enforced on either party at the request of the other, in a suit for restitution of conjugal rights. But this duty is never enforced on one party if the other has committed adultery. A Mormon husband, therefore, who had married a second wife, would be incapable of this remedy, and this court could in no way assist him towards procuring him the society of his wife if she chose to withdraw from him. And yet, by the very terms of his marriage compact, this second marriage was a thing allowed to him, and no cause of complaint in her who had acquiesced in that compact. And as the power of enforcing the duties of marriage would thus be lost, so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further, and declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had, according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the application of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration; and all this

without any act done with which he would be expected to reproach himself, or of which either woman would have the slightest right to complain. These difficulties may be pursued further in the reflection that if a Mormon had married fifty women in succession, this court might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life.

Is the court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily presuppose duties. There are no conjugal duties but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law. So much for the reason of the thing.

There is, I fear, little to be found in our books in the way of direct authority. But there is the case of *Ardaseer Cursetjee v. Perozeboye*, 10 Moo. P. C. 375, 419, in which the Privy Council distinctly held that Parsee marriages were not within the force of a charter extending the jurisdiction of the ecclesiastical courts to Her Majesty's subjects in India, "so far as the circumstances and occasions of the said people shall require." And the following passage sufficiently indicates the grounds upon which the court proceeded: "We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws or some customs having the effect of laws which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as from time out of mind were incident to their own caste, nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages."

In conformity with these views the court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

*Petition dismissed.*¹

¹ Following this case, it was decided by STIRLING, J., *In re Bethell*, 38 Ch. D. 220, that the issue of a marriage contracted in South Africa between an Englishman and a

SUTTON v. WARREN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1845.

[Reported 10 Metcalf, 451.]

ASSUMPSIT on a promissory note for \$1,300, given by the defendant to Ann Sutton, on the 10th of August, 1840. The case was submitted to the court upon the following facts agreed on by the parties : —

The note declared on was given for money lent by Ann Sutton to the defendant. The plaintiff and said Ann Sutton are natives of England, and were married at Duffield, in England, on the 28th of November, 1834. About one year after their marriage, they came to this country, where they have lived, as husband and wife, ever since. The said Ann was the own sister of the mother of the said Samuel Sutton, the plaintiff, and has always since said marriage gone by the name of Ann Sutton. Her former name was Ann Hills.

Judgment to be rendered for the plaintiff, if the court are of opinion that he is entitled to recover ; otherwise, he is to be nonsuit.¹

HUBBARD, J. It is a well-settled principle in our law that marriages celebrated in other States or countries, if valid by the law of the country where they are celebrated, are of binding obligation within this Commonwealth, although the same might, by force of our laws, be held invalid, if contracted here. This principle has been adopted, as best calculated to protect the highest welfare of the community in the preservation of the purity and happiness of the most important domestic relation in life. *Greenwood v. Curtis*, 6 Mass. 378 ; *Medway v. Needham*, 16 Mass. 157 ; *West Cambridge v. Lexington*, 1 Pick. 506 ; *Compton v. Bearcroft*, Bul. N. P. 114 ; *Scrimshire v. Scrimshire*, and *Middleton v. Janverin*, 2 Haggard, 395, 437. There is an exception, however, to this principle, in those cases where the marriage is considered as incestuous by the law of Christianity, and as against natural law. And these exceptions relate to marriages in the direct lineal line of consanguinity, and to those contracted between brothers and sisters ; and the exceptions rest on the ground that such marriages are against the laws of God, are immoral, and destructive of the purity and happiness of domestic life. But I am not aware that these exceptions, by any general consent among writers upon natural law, have been ex-

native woman, according to the native custom, could not take as legitimate. The court said : " I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England, unless it be formed on the same basis as marriages throughout Christendom, and be in its essence ' the voluntary union for life of one man and one woman, to the exclusion of all others.' " In *Brinkley v. Attorney-General*, 15 P. Div. 76, a marriage in Japan, according to the native custom, between an Englishman and a native, was held to be valid in England. See *Re Ullee*, 53 L. T. Rep. 711. — ED.

¹ Arguments of counsel are omitted. — ED.

tended further, or embraced other cases prohibited by the Levitical law. This subject has been carefully discussed by Chancellor Kent, in the case of *Wightman v. Wightman*, 4 Johns. Ch. 343; and while he is clear as to the exceptions before stated, he thinks, beyond them there is a diversity of opinion among commentators. 2 Kent Com., Lect. 26. See also Story's Conflict of Laws, §§ 113, 114. There is also a provision in our statutes, making marriages void in this State, where persons resident in the State, whose marriage, if solemnized here would be void, in order to evade our law, and with the intention of returning to reside here again, go into another State or country and there have their marriage solemnized. Rev. Sts., c. 75, § 6. The only object of this provision is, as stated by the commissioners in their report, to enforce the observance of our own laws upon our own citizens, and not to suffer them to violate regulations founded in a just regard to good morals and sound policy. As to the wisdom of this provision it is unnecessary here to speak. But the provision is noticed, to show that it has not been overlooked in the consideration of the case at bar, which presents no such state of facts.

In view of the whole matter, considering it as a part of the *jus gentium*, we do not feel called upon to extend the exceptions further. By our statutes, the marriage contracted between Samuel Sutton, the plaintiff, and Ann Hills, his mother's sister, if celebrated in this State, would have been absolutely void. But by the law of England, this marriage, at the time it was contracted, viz. in November, 1834, was voidable only, and could not be avoided until a sentence of nullity should be obtained in the spiritual court, in a suit instituted for that purpose. See Poynter on Marriage and Divorce, 86, 120; 2 Stephen's Com. 280. In *The Queen v. Inhabitants of Wye*, 7 Adolph. & Ellis, 771, and 3 Nev. & P. 13, the Court of King's Bench affirmed the doctrine, and held such a marriage voidable only, and that, till avoided, it was valid for all civil purposes. Rosc. Crim. Ev. (2d ed.) 286. Since this marriage was contracted, the St. of 6 Wm. IV., c. 54, has been passed, making such marriages which should afterwards be celebrated absolutely void.

In the present case, the marriage of these parties was not void by the laws of England, though voidable in the spiritual court. It never was avoided, and though absolutely prohibited by our laws, yet not being within the exception, as against natural law, we do not feel warranted in saying the parties are not husband and wife. The plaintiff, Samuel Sutton, sues on a promissory note given to the said Ann Sutton, and, as her husband, he can maintain an action thereon, in his own name alone, there being no other cause of objection raised than the one stated in regard to the legality of their marriage. Bayley on Bills (2d Amer. ed.), 42; Clancy, Husb. & Wife, 4.

Judgment for the plaintiff.

ROTH v. ROTH.

SUPREME COURT OF ILLINOIS. 1882.

[Reported 104 Illinois, 35.]

THIS is a bill by Madelaine Roth, claiming to be the widow of John George Roth to obtain her share of the property of said Roth situated in Illinois. The court dismissed the bill, and plaintiff appealed. The other facts appear in the opinion.¹

MULKEY, J. So far as the marriage between Roth and Madelaine Moser is concerned, we have no hesitancy in saying that for all purposes, in this State, it was a legal and valid marriage, notwithstanding Roth, at the time, was a subject of the kingdom of Würtemberg, and had not obtained a license authorizing such marriage from the sovereign of that kingdom, as required by the laws thereof. As both the parties were domiciled here at the time of its celebration, it is not important to determine whether the validity of a marriage depends upon the *lex domicilii* or the *lex loci contractus*, for whatever conclusion might be reached upon that question, the result would be the same, so far as this case is concerned. Both laws being identical, if the marriage was in conformity with either it must necessarily have been with the other also, and as it seems to have been solemnized in strict conformity with our statute regulating the subject, and as the parties were manifestly competent, under our own laws, to contract the relation, it follows, as before stated, the marriage was valid and binding.

While this marriage was clearly valid here for all purposes whatsoever, it does not follow that upon the return of the parties to the country of their nativity, and of which they were still subjects, it would or ought to be held equally valid there, for it is clearly settled by the decided weight of private international law, so called, that every State has the power to enact laws which will personally bind its citizens or subjects when sojourning in a foreign jurisdiction, provided such laws in terms profess to so bind them when thus circumstanced. It is true, such laws have no extraterritorial effect so as to authorize their enforcement in a foreign country, and may, therefore, so far as their execution is concerned, be said to remain dormant till the return of those violating them, when they will be enforced in the same manner, and to the same extent, as if their infraction had occurred within the State enacting them. Story on Conflict of Laws, §§ 114 *d*, 117, 244; Wharton on Conflict of Laws, § 161; Lawrence's Wheaton, p. 172; 4 Phill. Int. Law, 29, § 34; Piggott on Foreign Judgments, 167, 168; Dicey on Domicile, p. 215; 1 Burge on Col. Law, 188, 195, 196; 1 Bishop on Marriage and Divorce, § 368; Sussex Peerage Case, 11 Cl.

¹ This short statement is substituted for the statement of the reporter. Other points which were involved in the case are not here given. Part of the opinion is omitted. — Ed.

& Fin. 85; *Brook v. Brook*, 9 H. L. Cas. 193; *Fenton v. Livingston*, 3 Macq. 497; *Mette v. Mette*, 1 Sw. & Tr. 416; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Commonwealth v. Lane*, 113 Mass. 458.

Nor does it follow the status or relation created by the marriage could only be annulled by our own courts, or that it could only be annulled by other courts for such causes as would be recognized as sufficient for that purpose under our own laws. When the parties returned to Würtemberg and acquired a new domicile there, so far as their personal rights and relations are concerned our laws and government ceased to have any power over them or concern with them. Personally the State had no claims on them, and they owed it no allegiance or duty. *Barber v. Root*, 20 Mass. 260; *Hunt v. Hunt*, 72 N. Y. 228; *Kinnier v. Kinnier*, 45 N. Y. 535; *Cheever v. Wilson*, 9 Wall. 108; *Ditson v. Ditson*, 4 R. I. 87; *Harvey v. Farney*, L. R. 5 P. D. 153; same case affirmed, L. R. 6 P. D. 35; *Story on Conflict of Laws*, §§ 211, 213; 1 *Bishop on Marriage and Divorce*, §§ 367, 368; *Wharton on Conflict of Laws*, § 211; *Guthrie's Savigny on Private Internat. Law*, p. 248. Whether the kingdom of Würtemberg, on their return and acquiring a new domicile there, would recognize the status or relation which they had contracted here, depended upon its own laws, and not upon ours. That kingdom, in 1808, adopted an ordinance or law, which was in full force at the time of the marriage in Chicago, declaring all such marriages in a foreign State, without the license of the sovereign, absolutely null and void. It was, therefore, according to the general current of authority on the subject, entirely competent for the courts of that kingdom having jurisdiction of such matters, to give effect to that law by annulling and setting aside the marriage, upon a proper application for that purpose, which was done in this case. 1 *Bishop on Marriage and Divorce*, §§ 367, 368; *Story on Conflict of Laws*, §§ 18, 19, 21-23, 25; *Wharton on Conflict of Laws* (2d ed.), § 207; 4 *Phill. on Int. Law*, §§ 3, 11, 12, 13, 16, 24, 25; *Guthrie's Savigny on Private Int. Law*, 248.

Ordinarily, where a party, upon a change of domicile, goes into another State or country, the personal status which he carries with him will be recognized by the courts of the latter country. This is certainly the general rule, but it is subject to certain well recognized exceptions. If, for instance, such status has been acquired, as in the present case, by a violation of an express provision of the positive law of the State in which its recognition is asked, or if it be contrary to the genius and spirit of its institutions, as a title of nobility would be here, or if it is opposed to its settled policy, or to the good order and well being of society, or to public morality and decency, in all such cases the status would not and should not be recognized by the courts of the latter State. 2 *Kent*, p. 458; *Wharton on Conflict of Laws* (2d ed.), §§ 207, 165; *Story on Conflict of Laws*, §§ 93, 244; 4 *Phillimore on Int. Law* (ed. 1861), p. 529; *Brook v. Brook*, 9 H. L. Cas. 193; *Cincinnati Mutual Health Ass. v. Rosenthal*, 55 Ill. 91; *Forbes v. Cochrane*,

2 B. & C. 448; *Mette v. Mette*, 1 Sw. & Tr. 416; *Commonwealth v. Lane*, 113 Mass. 458; *Van Voorhis v. Brintnall*, 86 N. Y. 18.

Decree affirmed.

SCOTT and WALKER, J.J., dissenting.

UNITED STATES *v.* RODGERS.

DISTRICT COURT OF THE UNITED STATES, E. DIST. OF PENNSYLVANIA, 1901.

[*Reported 109 Federal Reporter*, 886.]

J. B. McPHERSON, District Judge. The relator is a naturalized citizen of the United States, and is the husband of Rosa Devine, and the father of her idiot son, William. Rosa and William are Russian Jews, whom the commissioner of immigration at the port of Philadelphia has ordered to be deported, on the ground that both are aliens, and that William is an idiot, and Rosa is a pauper that is likely to become a public charge. The alienage of both is denied upon the ground that when the husband and father became a citizen the wife and child ceased to be aliens; and this is the only point to be decided. The decision is admitted to depend upon the answer to be given to the question whether Rosa is the relator's lawful wife, or, rather, whether she is to be so regarded in this State; for she is her husband's niece, and such a marriage, if originally celebrated in Pennsylvania, would be void. Act 1860, § 39 (P. L. 393); 1 *Purd. Dig.* (ed. 1872), p. 54. Among the Jews in Russia, however, where the ceremony took place, it has been satisfactorily proved that a marriage between uncle and niece is lawful, and, being valid there, the general rule undoubtedly is that such a marriage would be regarded everywhere as valid. But there is this exception, at least, to the rule: If the relation thus entered into elsewhere, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this State to recognize the foreign marriage as valid. I think the following quotation from Dr. Reinhold Schmid, a Swiss jurist of eminence, to be found in *Whart. Confl. Laws* (2d ed.), § 175, correctly states the proper rule upon this subject:—

“When persons married abroad take up their residence with us, it is agreed on all sides that the marriage, so far as its formal requisites are concerned, cannot be impeached, if it corresponds either with the laws of the place where the married pair had their domicile, or with those where the marriage was celebrated. But we must not construe this as implying that the juridical validity of the marriage depends absolutely on the laws of the place under whose dominion it was constituted; for the fact that a marriage was void by the laws of a prior domicile is no reason why we should declare it void if it united all the requisites of a

lawful marriage as they are imposed by our laws. So far as concerns the material conditions of the contract of marriage, we must distinguish between such hindrances as would have impeded marriage, but cannot dissolve it when already concluded, and such as would actually dissolve a marriage if celebrated in the face of them. A matrimonial relation that in the last sense is prohibited by our laws cannot be tolerated in our territory, though it was entered into by foreigners before they visited us. We will, therefore, tolerate no polygamous or incestuous unions of foreigners settling within our limits."

Other authority may be found in *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, where it is said, in determining the effect of a statute that forbade sexual intercourse between persons nearer of kin than cousins:—

"We hold, therefore, that by section 7019, Rev. St., sexual commerce as between persons nearer of kin than cousins is prohibited, whether they have gone through the form of intermarriage or not; nor is it material that the marriage was celebrated in a country where it was valid, for we are not bound, upon principles of comity, to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based upon principles of sound public policy, because they have assumed, in another State or country, where it was lawful, the relation which led to the acts prohibited by our laws."

See also *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 8 Am. Dec. 131, and *In re Stull's Estate*, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539.

In view of this exception to the general rule, it seems to me to be impossible to recognize this marriage as valid in Pennsylvania, since a continuance of the relation here would at once expose the parties to indictment in the criminal courts, and to punishment by fine and imprisonment in the penitentiary. In other words, this court would be declaring the relation lawful, while the court of quarter sessions of Philadelphia County would be obliged to declare it unlawful. Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public. A review of the Pennsylvania legislation affecting the marriage of uncle and niece will be found in *Parker's Appeal*, 44 Pa. 309. It is accordingly ordered that Rosa and William Devine be remanded.

ANONYMOUS.

PARLEMENT OF PARIS. 1624.

[Reported 1 *Journal des Audiences*, 16.]

A YOUNG Parisian, on account of some escapade, withdrew to Lorraine, where he enrolled himself in the Duke of Lorraine's company of light horse; he became enamoured of a young lady of the place, who was in the service of Madame Desbordes, and through his friends made known his affection for her. Thereupon a marriage was arranged, and the betrothal celebrated in face of the church. Bans were once published, the two other publications dispensed with, and two weeks later they were publicly married in presence of the relatives of the girl, and many persons of quality. After the marriage they lived together seven weeks as husband and wife, and the woman became enceinte, and a son was in due time born.

The parents of the husband having learned of their son's marriage without their advice and consent, the mother went to Lorraine, found means to speak to her son, persuaded him to return to Paris, and had him secretly take the post for that purpose.

The wife, having learned that her husband had thus been taken from her, and was in Paris, followed him incontinently, during the plague, and on her arrival inquired for her husband; having learned that he was at his father's house, she had summons served on him at his father's house calling on him to return to her. The parents, learning that the woman was bringing this suit, had her arrested, charging her with the crime of abduction. The criminal complaint made at request of the parents recited that their son had been seduced, that they had not consented to the marriage, and consequently, according to the Edict of Blois,¹ it was an abduction and no marriage; and by judgment of the Lieutenant Criminal of the Châtelet the woman was declared guilty of the crime of abduction, forbidden to live with her husband, and condemned to pay costs. From this judgment appeal was taken to the court. There it was shown that the marriage in question had been solemnized in the face of Holy Church, all the ceremonies required by the Council of Trent having been observed, as has been said, and therefore that there was nothing illicit about the marriage. As to default of consent of parents, it was not to be considered, because the marriage had been celebrated in Lorraine, a sovereign State, where the edicts and ordinances of our kings are not observed. In Lorraine they require no other solemnities than those of the Council of Trent, which were exactly observed in this marriage; and if the marriage were to be declared invalid and an abduction it would be prodigious and monstrous; for the marriage would be good and valid in Lorraine,

¹ 14 Rec. des Anc. Lois Franc. 391 (Ordinance of May, 1579, § 40.) — ED.

and the child legitimate, but in France mere concubinage, and the child a bastard.

Thereupon judgment was given for the appellant; and as to the alleged crime of abduction, the complaint is dismissed. First President DE VERDUN delivered the judgment. *Gaultier* for appellant.

VIDAL *v.* VIDAL.

COURT OF PARIS. 1878.

[*Reported Dalloz*, 1878, II., 6.]

THE Civil Tribunal of the Seine delivered the following judgment.¹

Vidal married Estella Van Krenemburgh, a Hollander (who became French by the marriage), at Paris on November 14, 1864. By a judgment of this Tribunal, March 5, 1866, a judicial separation was granted to the Vidals. On October 25, 1873, Vidal and his wife, by common consent and in a single document dated at Paris, prayed the Council of State of the Canton of Schaffhausen for letters of naturalization, that they might both acquire Swiss nationality. On January 17, 1874, the Grand Council of the Canton of Schaffhausen granted naturalization to Vidal, and on the following 11th of March naturalization papers were delivered to him as a citizen of Osterfingen. By a certificate from the municipality of Osterfingen dated March 4, 1874, and by a certificate delivered from the Chancellery of State of the Canton of Schaffhausen on November 7, 1876, it appears that Mme. Vidal became as a result of these papers a Swiss subject, in conformity with the express request made by her, while the children of the marriage preserved their French nationality.

Hardly had the naturalization been obtained when on February 28, 1874, Vidal filed a libel for divorce in the Superior Court of the Canton of Schaffhausen; in the following April a similar libel was filed by Mme. Vidal; and on September 4 a final decree declared the marriage dissolved, and the spouses completely divorced, costs being divided, and all further demands waived on both sides. October 19 a certificate of nationality was delivered by the municipality of Osterfingen to Mme. Vidal, under the name of Adèle Estelle, born Van Krenemburgh, judicially divorced; the certificate, by an express provision, serving only for convenience in foreign travel, not for marriage, for the validity of which the conditions prescribed in the Canton must be observed. A month later, November 19, a new decree of the cantonal court authorized Mme. Vidal, divorced, to contract a second marriage after December 4; and, finally, January 23, 1875, Mme. Vidal married Louis Geofroy, before the officer of civil status of the first ward of Paris, as

¹ Only so much of the judgment as deals with the case on the merits is given. — Ed.

divorced wife of William Vidal authorized to remarry by the aforesaid decree.

From the foregoing, and from other documents in the case, it is clear that the Vidals desired Swiss nationality and sued for divorce by previous agreement, with a view to work a fraud on that principle of French law which regards the conjugal tie as indissoluble; that neither acquired Swiss nationality with a view of ever exercising the rights so obtained, or with the intention of fulfilling the corresponding obligations. Vidal did not leave France, but continued to dwell at Paris, where he still resides. In the same way Mme. Vidal submitted to the foreign law only that she might by divorce escape from the bonds of her first marriage and contract a second, by which she was going to recover the quality of Frenchwoman which she had just discarded.

A second marriage contracted before the dissolution of the first is by the French law absolutely null.

The defendants vainly set up, whether against Vidal or the public minister, the act of naturalization which has subjected the Vidals to the Swiss law, and the decree of divorce, which has separated them in accordance with that law. They cannot claim, against either, that the act of naturalization and the decree of divorce, emanating from an independent and sovereign foreign authority, cannot be nullified by the French courts. The naturalization of a Frenchman abroad has the result not only of making him acquire a foreign nationality, but at the same time of causing him to lose his quality as Frenchman. In this last respect it cannot prejudice the rights of any third party previously acquired under the protection of the French law. Furthermore, it ought to constitute, on the part of a Frenchman who obtains it, the exercise of a lawful right, and not the abuse of an opportunity and the nullification of the aforesaid legal protection. In this case the naturalization, if it has been obtained solely with a view to defraud the French law and to elude certain fundamental prohibitions of it, cannot be invoked as against interests of public and private order which that law aims to protect. The law of the French courts, thus declared, does not attack the principle of the respective independence of the sovereignties. These courts do not attempt to nullify the act of a foreign power, which indeed is beyond their control. They profess only to refuse it effect as to persons whom it could not bind, or as to the national law whose authority they must maintain.

Since the defendants cannot avail themselves of the act of naturalization which they invoke, they cannot set up the decree of divorce which depends upon it. It makes no difference that Vidal assented to these acts, since at the time he was acting fraudulently. His accomplice in the fraud cannot set them up against him as if they had been done under ordinary conditions. But even if they could be set up against Vidal, the public minister, whose right to demand nullity of the marriage is quite independent, is not affected by them.

The first marriage of Mme. Vidal was therefore not legitimately dis-

solved as regards the French law before she contracted the second, which is therefore absolutely null. The defendants vainly set up good faith in their marriage, which they say was contracted under an error of law shared by the officer of civil status himself. This justification is disproved by all the facts in the case, as they have been stated. This is true both in the case of Mme. Vidal, whose premeditated intent to contract a second marriage in spite of the first is abundantly established, and in the case of Geofroy, who must in reason have suspected the conditions under which he was marrying Mme. Vidal even if, contrary to all probability, he was not long since expressly informed of them.

For these reasons, the court permits the public minister to intervene in Vidal's suit for the nullity of Mme. Vidal's second marriage; declares null and void the marriage contracted by Mme. Vidal with M. Geofroy before the officer of civil status of the first ward of Paris, on January 23, 1875.

The Court of Paris affirmed the decision, adopting its reasons in every particular.

PLAQUET v. MAYOR OF LILLE.

COURT OF CASSATION. 1878.

[*Reported Sirey*, 1878, I. 320.]

THE COURT. By the terms of Article 147 of the Civil Code it is permitted to contract a second marriage when proof is made of the dissolution of the first. This proof is made on the part of a foreigner, when he shows that his marriage has been dissolved in accordance with the laws of the nation to which he belongs. His capacity being regulated in such a matter by his statute personal, his liberty to remarry follows him to France; and the juridical fact which has conferred this liberty cannot be ignored, even when he projects a new marriage with a Frenchwoman. The law of May 8, 1816, which abolished divorce in France, is not in point: nothing in the language of it indicates the intention of refusing effect to a legal divorce regularly decreed abroad by the courts of the proper country; this law, therefore, has tacitly recognized the respect due to foreign decrees operating upon the status and capacity of persons submitted to their sovereignty. It is objected, on the other hand, that public order and good morals are opposed to any marriage which the divorced foreigner would contract in France; but such an objection is met by the consideration that even a Frenchman himself, divorced before the law of 1816, has always been allowed in France, since the promulgation of that law, to contract a new marriage, and there is no reason to hold that what is morally and

legally allowed in the one case can be regarded in the other as contrary to public order and good morals.

It makes little difference, in the application of these principles, that the first marriage was contracted with a Frenchwoman; for since she thereby became a foreigner the decree of divorce has all the authority of a decree against foreigners, and if we can regard the woman as become French again it is only in so far as her marriage is regarded as legally dissolved.

It is recited as fact in the judgment appealed from that Abel Henry Plaquet, born at Lille of Belgian parents, retained the nationality of his father and mother; that in 1868 he married a Frenchwoman; but that as a result of a decree of the Civil Tribunal of Tournay (Belgium) for a divorce of the spouses, this divorce has been declared, in conformity with the Belgian law, by the proper officer of civil status, July 17, 1873. Consequently, when Plaquet presented himself in 1876 before the Mayor of Lille to contract a new marriage, he proved the dissolution of the first and did not come under the prohibition of Article 147 of the Civil Code. It follows that in authorizing the Mayor of Lille to refuse to proceed to the publications and celebration of the second marriage projected by said Plaquet, under pretence that it would be contrary to law, public order, and good morals, the judgment appealed from violated Articles 3 and 147 of the Civil Code, and falsely applied Article 6 of the same Code and Article 1 of the law of May 8, 1816.

Judgment quashed.

SECTION III.

LEGITIMACY.

BIRTWHISTLE v. VARDILL.

HOUSE OF LORDS. 1840.

[Reported 7 *Clark & Finnelly*, 895.]

THIS case came from the King's Bench on Writ of Error. The case was first argued in the House of Lords in 1830. No judgment was then given, but on account of the difficulty and novelty of the case, it was ordered to be reargued.¹ On the first of July, 1839, the case was reargued before TINDAL, C. J., VAUGHAN, BOSANQUET, PATTESON, WILLIAMS, COLERIDGE, COLTMAN, and MAULE, JJ., and PARKE and GURNEY, BB. A question was framed and put to the judges; and their unanimous opinion was delivered in the following terms.²

¹ These proceedings are reported in 2 Cl. & F. 574. — Ed.

² This short statement is substituted for that of the reporter. Part of the advisory opinion is omitted. Lord BROUGHAM delivered an elaborate opinion, concurring, after doubt, with the Lord Chancellor. — Ed.

TINDAL, Lord Chief Justice. My Lords, the facts of the case upon which your Lordships propose a question to Her Majesty's judges are these: "A. went from England to Scotland, and resided and was domiciled there, and so continued for many years, till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland, according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child take place in Scotland, such child born in Scotland before the marriage is equally legitimate with children born after the marriage, for the purpose of taking land, and for every other purpose. A. died seised of real estate in England, and intestate." And your Lordships, upon the foregoing state of facts, found this question, viz.: "Is B. entitled to such property as the heir of A.?" And in answer to the question so proposed to us, I have the honor to state to your Lordships, that it is the opinion of all the judges who heard the argument that B. is not entitled to such property as the heir of A. We have, indeed, reason to lament that we have been deprived of the assistance of one of our learned brethren who heard the case argued at your Lordship's bar, the late Mr. Justice VARGHAN; but as he had expressed a concurrent opinion upon the case at a meeting held immediately after the argument, I feel myself justified in adding the authority of his name to that of the other judges.

My Lords, the grounds and foundation upon which our opinion rests are briefly these: That we hold it to be a rule or maxim of the law of England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of the comity of nations.

My Lords, to understand the nature and force of this rule of our law, "that the heir must be a person born in actual matrimony in order to enable him to take land in England by descent," and to perceive, at the same time, the positive and inflexible quality of this rule, and how closely it is annexed to the land itself, it will be necessary to consider the earlier authorities in which that rule is laid down and discussed, both before and subsequently to the statute of Merton,

and more particularly the legal construction and operation of that statute. . . .

At the parliament holden at Merton, in the 20th Henry III., the statute was framed, which will be found to have a strong and direct application to the present question. That statute has not upon the original roll the title prefixed thereto, upon which observations were made at your Lordships' bar, that it showed the intention of the law to have been no more than to declare the personal status of those who are described in such statute. In the edition of the statutes published under the commission from the Crown, there is no other than the general title "*Provisiones de Merton*;" and no more argument can justly be built upon the title prefixed in some editions of the statutes, than upon the marginal notes against its different sections. That statute or provision of Merton runs thus, viz.: "*To the King's writ of bastardy, whether any one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered that they would not nor could not make answer to that writ, because it was directly against the common order of the church, and all the bishops instanted the lords that they would consent that all such as were born afore ~~matrimony~~ matrimony should be legitimate, as well as they that be born within matrimony, as to the succession to inheritance, forasmuch as the church accepteth such as legitimate. And all the earls and barons, with one voice, answered that they would not change the laws of the realm which hitherto had been used and approved.*" . . .

It therefore appears to be the just conclusion from these premises, that the rule of descent to English land is, that the heir must be born after actual marriage of his father and mother, in order to enable him to inherit; and that this is a rule of a positive inflexible nature, applying to, and inherent in, the land itself, which is the subject of descent, of the same nature and character as that rule which prohibited the descent of land to any but those who were of the whole blood to the last taker, or like the custom of gavelkind or borough-English, which cause the land to descend, in the one case, to all the sons together; in the other, to the younger son alone.

And if such be, as it appears to us to be, the rule of law which governs the descent of land in England, without any exception, either express or implied therein, on the score of the place of birth of the claimant, it remains to be considered whether, by any doctrine of international law, or by the comity of nations, that rule is to be let in by which B., being held to be legitimate in his own country for all purposes, must be considered as the heir-at-law in England.

The broad proposition contended for on the part of the plaintiff in error is, that legitimacy is a personal status to be determined by the law of the country which gives the party birth; and that, when the law of that country has once pronounced him to be legitimate, he is, by the comity of international law, to be considered as legitimate in

every other country also, and for every purpose; and it is then contended that, as by the Scotch law there is a *presumptio juris et de jure*, that, under the circumstances supposed, the parents of B. were actually married to each other before the birth of B., such presumption of the Scotch law, by which his legitimacy is effected, must also be adopted and received to the same extent in the English as in the Scotch courts of justice.

Now, there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom.

But it does not therefore follow, that, with the adoption of the marriage contract, the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated. That the marriage in question was not celebrated in fact until after the birth of B. is to be assumed from the form of the question. Indeed, except on that supposition, there would be no question at all. Does it follow, then, that because the Scotch hold a marriage celebrated between the parents after the birth of a child to be conclusive proof of an actual marriage before, a foreign country, which adopts the marriage as complete and binding as a contract of marriage, must also adopt this consequence? No authority has been cited from any jurist or writer on the subject of the law of nations to that effect, — nothing beyond the general proposition that a party legitimate in one country is to be held legitimate all over the world. Indeed, the ground upon which this conclusion of B.'s legitimacy is made by the Scotch law, is not stated to us, and we have no right to assume any fact not contained in the question which your Lordships have proposed to us. We may, however, observe that, in the course of the argument at your Lordships' bar, the ground has been variously stated, upon which the laws of different countries have arrived at the same conclusion. It was asserted that, by the law of Scotland, the subsequent marriage is not to be taken to be the marriage itself, but only evidence, though conclusive in its nature, of the marriage prior to the birth of B.; that the canon law rests the legitimacy of the son born before such marriage upon a ground totally different, viz., that having been born illegitimate, he is made legitimate, *legitimus*, by the subsequent marriage, by a positive rule of law, on account of the repentance of his parents; whereas, by the Scotch law, a marriage previous to his birth is conclusively presumed, so that he always was legitimate, and his parents had nothing to repent of. Pothier, on the other hand (*Contrat de Marr.*, part. v. ch. 2, art. 2), when he speaks of the effect of a subsequent marriage, in legitimating children born before it, disclaims the authority of the canon law, nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of Troyes,

“Les enfans nés hors mariage De Soluta et Solutâ puis que le père et la mère s'épousent l'un l'autre, succèdent et viennent à partage avec les autres enfans si aucuns y' à ;” and then adds, “that it is a common right received throughout the whole kingdom.”

Now it could never be contended by any jurist, that the law of England in respect to the succession of land in England, would be bound to adopt a positive law of succession like that which holds in France, the distinction being so well known between laws that relate to personal status and personal contracts, and those which relate to real and immovable property; for which it is unnecessary to make reference to any other authority than that of Dr. Story, in his admirable Commentaries on the Conflict of Laws. (See sections 430 and following, where all the authorities are brought together). And if such positive law is not upon any principle to be introduced to control the English law of descent, what ground is there for the introduction into the English law of descents, not only of the contract of marriage observed in another country, which is admitted to be adopted, but also of a fiction with respect to the time of the marriage? that is, in effect, of a rule of evidence which the foreign country thinks it right to hold.

But admitting, for the sake of argument, and we are not called upon to give our opinion on that point, that B., legitimate in Scotland, is to be taken to be legitimate all over the world; the question still recurs, whether, for the purpose of constituting an heir to land in England, something more is not necessary to be proved on his part than such legitimacy; and if we are right in the grounds on which we have rested the first point, one other step is necessary, namely, to prove that he was born after an actual marriage between his parents; and if this be so, then, upon the distinction admitted by all the writers on international law, the *lex loci rei sitæ* must prevail, not the law of the place of birth.

My Lords, in the course of the discussion, some stress appears to have been placed on the argument, that if B. had died before A. the intestate, leaving a child, such child might have inherited to A., tracing through his legitimate parent; and then it was asked if the child might inherit, why might not the parent himself inherit? But the answer to that supposed case appears to be, that if the parent be not capable of inheriting himself, he has no heritable blood which he can transmit to his child; so that the child could not, under the assumed facts, have inherited, and the question therefore becomes, in truth, the same with that before us. The case supposed would be governed by the old acknowledged rule of descent: “Qui doit inheriter al père, doit inheriter al fitz.”

My Lords, the two decided cases that have been relied upon in the course of argument, that of *Shedden v. Patrick*, and that of the *Strathmore Peerage*, do not, upon consideration, create any real difficulty. Those cases decide no more than that no one can inherit without hav-

ing the personal status of legitimacy, — a point upon which all agree ; but they are of no force to establish the main point in dispute in this case, viz., that such personal status is sufficient of itself to enable the claimant to succeed as heir to land in England.

Upon the whole, in reporting to your Lordships as the opinion of the judges, “ that B. is not entitled to the real property as the heir of A., ” I am bound at the same time to state, that although they agree in the result, they are not to be considered as responsible for all the grounds and reasons on which I have endeavored to support and to explain such opinion.

LORD COTTENHAM, Lord Chancellor. My Lords, I was not in your Lordships’ house when this case was first argued ; but I was present at the argument when the learned judges were in attendance, and I gave my attention to the opinion expressed by the Lord Chief Justice, and I entirely concur in that opinion. I am extremely satisfied with the ground upon which the judges put it, because they put the question on a ground which avoids the difficulty that seems to surround the task of interfering with those general principles peculiar to the law of England, principles that at first sight seem to be somewhat at variance with the decisions to which the courts have come. Under these circumstances, as my noble and learned friend does not move the judgment, I move judgment for the defendant in error.

*Judgment accordingly.*¹

ATKINSON v. ANDERSON.

CHANCERY DIVISION. 1882.

[*Reported 21 Chancery Division, 100.*]

THIS was a petition by the four natural children of James Anderson, praying for the distribution of a fund in court, the proceeds of sale of certain real estate situate in Cumberland. The principal question raised was whether the duty payable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), should be at the rate of 1 or 10 per cent. James Anderson was a native of Cumberland. He left England prior

¹ *Acc. Fenton v. Livingston, 3 Macq. 497 ; Lingen v. Lingen, 45 Ala. 410 ; Williams v. Kimball, 35 Fla. 49, 16 So. 783 ; Smith v. Derr, 34 Pa. 167.* Conversely land was held to descend to persons described as heirs in the local statutes, though they were not legitimate by the law governing their status. *Harvey v. Ball, 32 Ind. 98 ; Estate of Oliver, 184 Pa. 306, 39 Atl. 72.* See *Leonard v. Braswell, 99 Ky. 528.*

It has, however, been held in other States, under the statutes of inheritance there in force, that one having a legitimate status (though illegitimate at birth) may inherit land. *Scott v. Key, 11 La. Ann. 232 ; Ross v. Ross, 129 Mass. 243 (semble) ; Miller v. Miller, 91 N. Y. 315.* So, conversely, that one illegitimate by the law governing his status cannot inherit, though by the law of the situs he would be legitimate, *Smith v. Kelly, 23 Miss. 167.* — Ed.

to October, 1839, and went to reside in Rome, and there carried on business as a photographer under the name of Isaac Atkinson, being desirous that his friends should not know where he was located. He resided in Rome down to the time of his death, and acquired an Italian or Roman domicil. He never married, but cohabited with an Italian woman, by whom he had four children, sons, all born in Rome prior to the year 1862. In 1870 the Papal States were annexed to the kingdom of Italy, and became subject to the government of King Victor Emmanuel. In the certificates of baptism of three of the children the names of the parents were given, but in the certificate of baptism of the second child they were not given. The mother died many years ago. The four children were acknowledged and treated by James Anderson as his own, and he paid for their maintenance and education.

In December, 1876, James Anderson made a will in the Italian language leaving his property equally between his four sons, naming them. This will was invalid according to the law of Italy because it was not executed before a notary; and it was invalid according to the law of England because it was not signed by the testator in the presence of two witnesses. James Anderson died on the 28th of February, 1877. On that day he made a will in English form and gave unto his four natural sons, naming them, all his property whatever, landed or real, in Italy, in England, or elsewhere, equally between them. He appointed executors, and they proved the will in May, 1877. James Anderson at the time of his death was entitled to real estates situate in Cumberland. An action of ejectment was brought in 1878 to recover possession of the estates. Subsequently and after much litigation a compromise was come to under the sanction of the court and in accordance with the terms agreed upon. The estates were sold for the sum of £8,000 and the money was paid into court to the credit of the action.

According to the law of the Papal States and of Italy, natural born children who have been recognized by their parents are entitled to right of succession. By the law of Italy a formal recognition is required, by the law of the Papal States any recognition is sufficient.

James Anderson having died intestate as to his personal estate and leaving no other than the four children named, they were admitted to succeed as *heredes ab intestato* to his personal estate in Rome — they having been sufficiently recognized by him as his natural born children, and they now asked by their petition that the fund in court should be ordered to be paid to them.¹

HALL, V. C. The question in this case has been very elaborately and ably argued. It is no doubt one of considerable importance and difficulty. I have to determine what is the status of the petitioners. The argument on their behalf has been that they are not strangers in blood to the testator. It has not been contended that they are his children in the

¹ Arguments of counsel are omitted. — ED.

ordinary sense of the word, but that though not his children they are persons who according to the law of Rome may be described as being children who are capable of taking, and who have in fact taken, property as his natural children. They have taken property in Rome which belonged to the testator, having been recognized there as being his natural children—being as such, by the law of the country governing the succession to property, entitled to take it. It appears to me that I must, in construing the Succession Duty Act, 1853, determine the meaning of the last branch of section 10 according to what should be the interpretation to be put upon it by the court. Looking at the facts as to the status of the petitioners, I consider that it has been clearly proved that they were not born in wedlock, and that subsequently to their births their parents never became man and wife. That being so, according to the law of England they are unquestionably strangers in blood to the testator. There is nothing whatever to show, for the purposes of the statute, nor indeed in any sense, that the petitioners are in any other position than that, and the fact that they have been, by the law of their country, allowed to take the property of their father, as being his natural children, does not in my opinion, on the construction of the statute, make them anything else than strangers in blood. This seems to me to be the plain result of the evidence and the law in regard to their status, and I cannot recognize that, because of their being the natural children of the testator, there is some degree of relationship between them and him—their father—which should prevent their being held to be, for the purposes of the statute, strangers in blood to him, and therefore that they do not come within the last clause of the 10th section of the statute. That, in my opinion, is their position or character according to the law of England, and nothing has been shown which enables me to say that under the statute they are entitled to succession to this fund in any other. That which the petitioners obtained possession of in a foreign country, they got according to the law of that country, and they have no other status. I hold as regards the fund in court that the petitioners are strangers in blood to the testator, and that the Crown is entitled to be paid 10 per cent duty.

IN RE ANDROS.

CHANCERY DIVISION. 1883.

[Reported 24 Chancery Division, 637.]

WILLIAM ANDROS, who died in January, 1882, by his will dated in August, 1879, gave (*inter alia*) one-third part of his personal estate to trustees “upon trust to pay and divide the same equally between such of his great nephews, the sons of his deceased nephew Thomas

Godfrey Andros," as should survive him and attain the age of twenty-five years, in equal shares; but he gave his said trustees absolute discretion to pay to his said great nephews, or either of them, the whole or any portion of the capital of the shares or share to which they or he might be presumptively entitled at any time or times his said trustees might consider it expedient to do so.

Thomas Godfrey Andros was a native of Guernsey, and by the laws of that island a child born before the marriage of his parents becomes legitimate upon their subsequent marriage as fully as if he had been born in wedlock.

The plaintiff was the son of T. G. Andros, and he was born in Guernsey in December, 1860. In January, 1865, T. G. Andros married in Guernsey the plaintiff's mother, he had four children after the marriage, and he died domiciled in Guernsey on the 12th of November, 1875. The plaintiff had attained twenty-one, and the trustees of the will being ready to pay him his due share of the one-third of the testator's residuary personal estate if they could lawfully do so, the question submitted for the opinion of the court was whether the plaintiff ought to be deemed to be a legitimate son of Thomas Godfrey Andros, and as such entitled to share with his children born after wedlock in the testator's bequest.

KAY, J. This will being an English will must of course be construed according to English law. That law requires that all who take under a gift to sons of a named father should be legitimate offspring. It must now be treated as settled that any person legitimate according to the law of the domicile of his father at his birth is legitimate everywhere within the range of international law for the purpose of succeeding to personal property.

The well-known case of *Doe v. Vardill*, 7 Cl. & F. 895; 6 Bing. N. C. 385; 9 Bl. (N. S.) 32, which introduced a distinction in this respect in the case of a person claiming to succeed as heir to real property in England by requiring such a person to establish his legitimacy according to English law — that is, as though the father had been domiciled in England at the time of the birth of the child — treats this as an exceptional case and recognizes that the rule of succession to personal estate is otherwise, and this has been recently more expressly decided by the Court of Appeal in *In re Goodman's Trusts*, 17 Ch. D. 266.¹

If, then, a child of a foreigner legitimate according to the law of his father's domicile, though illegitimate if his father had been a domiciled Englishman, can succeed as next of kin to personal estate in England, why should he not take a bequest of personalty by the description of the son of his father in the will of an English testator? On principle it seems to me very difficult to say why he should not.

However, in *Boyes v. Bedale*, 1 H. & M. 798, the late Lord Hatherley in a considered judgment decided that such a person could not take

¹ *Contra* *Lingen v. Lingen*, 45 Ala. 410. — ED.

under a gift to the children of his father. The will and every term in it, his Lordship held, must be construed according to English law. If in a Canadian will there were a gift of £100, that would mean £100 Canadian currency not £100 sterling. So the testator "must be taken to mean a child in the sense in which the law of England understands the term."

Speaking with all deference, the illustration seems to me inapt and wanting in analogy. If two countries happen to have the same name for their monetary currency no one for a moment could suppose that a testator in one of these using the familiar name of the currency of his own country meant by that the currency of different value of the foreign country which happened to have the same name; but how does it follow from this that a gift to the children of a foreigner means such children only as would be legitimate if he had been a domiciled Englishman? A bequest in an English will to the children of A. means to his legitimate children, but the rule of construction goes no further. The question remains Who are his legitimate children? That certainly is not a question of construction of the will. It is a question of status. By what law is that status to be determined? That is a question of law. Does that comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it. The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended A's legitimate children. If you ask the further question, Did he intend his children who would be legitimate according to English law or his actual legitimate children? How can the rule of construction answer that?

Lord Hatherly considered that the bequest must be read to such children as would be legitimate according to the law of England if their father had been a domiciled Englishman at their birth. But is that according to the English rule of construction that children means legitimate children? Try it thus. Suppose the same rule of construction to prevail in Guernsey, and that in the will of a Guernsey testator there were a bequest to the children of an Englishman. According to *Boyes v. Bedale*, 1 H. & M. 798, children would mean such children as would be legitimate according to the law of Guernsey. By this construction *ante nati* of the English father would share with his children legitimate according to English law, because they would have been legitimate if the father had been domiciled in Guernsey, though they were in fact illegitimate by English, and, of course, by international law.

This would not carry out, but contravene, the rule of construction.

Vice-Chancellor Kindersley, in *In re Wilson's Trusts*, Law Rep. 1 Eq. 247, expressed his readiness to follow *Boyes v. Bedale*. The facts of that case, however, were not the same. A domiciled Englishman had married an Englishwoman. He went to Scotland, and without

having a Scotch domicil he sued for and obtained a Scotch divorce, which was not sufficient to dissolve the English marriage. The woman then married in Scotland a domiciled Scotchman, and had children by him, and the question was whether they could be considered legitimate in England. The decision of Vice-Chancellor Kindersley was supported in the House of Lords (*Shaw v. Gould*, Law Rep. 3 H. L. 55) on the ground that international law did not require the English courts to recognize such a divorce, and therefore the children were not by that law legitimate.

That decision does not apply, because it cannot be denied that the children in this case would be recognized as legitimate, for some purposes at any rate, by every other State in Christendom.

These are the two cases most nearly in point on the one side. On the other there are two decisions of Vice-Chancellor Stuart, Goodman *v. Goodman*, 3 Giff. 643, and *Skottowe v. Young*, Law Rep. 11 Eq. 474. The late Master of the Rolls observes of the former that the point was not there really considered and decided. See *In re Goodman's Trusts*, 14 Ch. D. 619. But according to the report it certainly was argued, and the decision was that *ante nati* born in England while the father was domiciled here could not take under a gift to children, but that an *ante natus* born in Holland when the father was domiciled there might take in conjunction with the *post nati* by the same mother whom he married in that country, thus legitimatizing the *ante natus* there. *Skottowe v. Young* was a question of legacy duty, but the same point was involved.

Besides these two cases there is the analogy which I have referred to derivable from the decisions, showing that a child legitimate by the law of his father's domicil may take as next of kin in a succession to personal estate in England.

But in addition to these considerations there is the opinion of Lords Justices Cotton and James in the case of *In re Goodman's Trusts*, 17 Ch. D. 266. The former says, *Ibid.* 295 :—

“In *Boyes v. Bedale*, 1 H. & M. 798, the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named. The Vice-Chancellor held that a child exactly in the same position as Hannah Pieret was not entitled under the bequest. He said that the will, being that of a domiciled Englishman, must be construed according to English law, which, in my opinion, is correct so far as to require that this word ‘children’ shall be construed ‘legitimate children.’ But he held that English law recognized as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in England at the time of their birth, is, in my opinion, erroneous as to children born of parents who at the time of the birth were domiciled in a country by the law of which the children were legitimate.”

Lord Justice James says, 17 Ch. D. 299 : “The decision in *Boyes v. Bedale* was on the ground that, in an Englishman's will, the children

of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in England, and made in favor of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction?"

The decision in *In re Goodman's Trusts*, 17 Ch. D. 266, overruled the late Master of the Rolls, and was dissented from by Lord Justice Lush.

This conflict of authority leaves me free to decide this case according to my own opinion, which is in favor of the plaintiff's claim.

I observe that the testator describes the objects of his bounty not merely as the sons of his deceased nephew Thomas Godfrey Andros, but also as his own great nephews; but that, in my opinion, makes no difference. The law of this country by the comity of nations recognizes the plaintiff as legitimate, and therefore he is as much the lawful nephew of the testator as he is the lawful son of J. G. Andros.

The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognized in this country, those children are legitimate whose legitimacy is established by the law of the father's domicil. Thus *ante nati* whose father was domiciled in Guernsey at their birth, and subsequently married the mother so as to make the *ante nati* legitimate by the law of Guernsey, are recognized as legitimate by the law of this country, and can take under such a gift.¹

VAN MATRE v. SANKEY.

SUPREME COURT OF ILLINOIS. 1893.

[Reported 148 Illinois, 536.]

MARY F. VAN MATRE filed her bill in chancery in the Cook County Circuit Court, alleging that she and others named in the bill, including Caroline C. Sankey, were the heirs-at-law of Samuel Sankey, who died intestate in November, 1886, without issue or widow surviving him, and seized of certain lots and lands in said county, of which partition was sought among said collateral heirs of said decedent. The bill also set up that appellant Henry L. Glos and others claimed some interest in certain of the lands under tax deeds which were alleged to be void, and were asked to be removed as clouds upon the title of complainant and her co-heirs.

Caroline C. Sankey answered the bill, denying that others were inter-

¹ Acc. *In re Grey's Trusts*, [1892] 3 Ch. 88. — Ed.

ested in said land and lots, and claiming title in fee to the whole, as heir-at-law of the said Sankey, and filed her cross-bill, alleging that by virtue of certain adoption proceedings in the court of common pleas of Lycoming County, Pennsylvania, she was adopted by said Samuel Sankey, deceased, on the 2d day of January, 1879, and that said Sankey having died without issue, and leaving no widow him surviving, his estate descended to her as heir-at law. The cross-bill also alleged that said Glos and others held certain tax deeds which were a cloud upon her title, and alleging in the cross-bill, as amended, certain defects therein, and praying that the same be removed as a cloud, etc.

Upon the issues joined upon the original and cross-bills, the court found and decreed in accordance with the prayer of the cross-bill; dismissing the original bill; finding that the tax deeds alleged were void, and upon the terms of payment by complainant in the cross-bill, of the taxes for which the tracts were severally sold, interest and costs, etc., removing them, severally, as clouds, etc. From the decree dismissing the original bill and quieting the title in the complainant in the cross-bill, Mary F. Van Matre appeals, and from so much of the decree as finds the several tax deeds void and clouds, etc., the said Henry L. Glos appeals.¹

SHORE, J. It is insisted that the decree of adoption, although valid in the State of the domicil of the child, and, *pro tempore*, of the person adopting her, cannot affect the descent of real property in Illinois, and *McCartney v. Osburn*, 118 Ill. 403, is cited as supporting that contention. This is a misapprehension of the case cited, as well as of the effect of the decree of adoption. In the *Osburn Case* the courts of Pennsylvania had given construction to clauses of a will as affecting property situated in that State, and the question was, whether the parties were estopped, by the construction there given, in proceedings in this State affecting real property in this State. It was held that they were not, and that the courts of each State must construe the will, as affecting lands within their respective jurisdictions, for themselves, and might do so as if the several properties were devised by separate wills. The real property passed under the law of its situs, and not by the law of the domicil of the testator, and therefore the will must be construed under the laws of this State, and that construction control its disposition. That case was expressly distinguished from *Hanna v. Read*, 102 Ill. 596, and like cases, in which it is held that the right to re-litigate is concluded by the former adjudication.

The proceeding in this case was in the nature of a proceeding *in rem*, the purpose being to change the status of the child in her relation to said Samuel Sankey. The decree of adoption was a declaration by competent authority, operative to change her status, and, *ipso facto*, to render her that which she was declared to be, — the heir-at-law of Samuel Sankey, — and capable of inheriting from him, in all respects, as if she had been his child born in lawful wedlock. 2 Black on

¹ Part of the statement of facts and part of the opinion are omitted. — Ed.

Judgments, 792, *et seq.* The statute under which the adoption proceedings were had, provides that the child shall be decreed to take the name of the adopting parents, "and have all the rights of a child and heir of such adopting parents, and be subject to the duties of such child." The decree, by force of this statute, established, *eo instanti* its rendition, the relation of parent and child, imposed upon the parties the reciprocal duties and obligations of that relation, and impressed upon and invested the child with the rights and qualities of a child and heir-at-law of Samuel Sankey. This we understand to be the construction of the statute by the courts of that State. Wolf's Appeal (Pa.) 13 Atl. 760. The status of appellee having been established under and existing by virtue of the *lex domicilii*, is to be recognized and upheld in every other State, unless such status, or the rights flowing therefrom, are inconsistent with or opposed to the laws and policy of the State where it is sought to be availed of.

This court, in *Keegan v. Geraghty*, 101 Ill. 26, quoted with approval the language of Mr. Justice Gray in *Ross v. Ross*, 129 Mass. 243, as follows: "It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicil, and this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy," and the principle announced, with its limitation, was expressly approved. *Roth v. Roth*, 104 Ill. 348. In the *Keegan Case*, *supra*, the child, adopted under the laws of Wisconsin, sought in this State to take, not from the adopting parent, but from collaterals and by representation. This court expressly recognized the status established in Wisconsin, so far as it related to the right to inherit from the parent by adoption, because consistent with the laws of this State relating to descent to adopted children, but denied the right to take by representation from collateral kindred of the parent, for the reason that such taking was prohibited by and inconsistent with the laws of this State. Rev. Stat. sect. 1, par. 5, chap. 39. No inconsistency with our laws or their policy exists in this case. The rights claimed under and by virtue of the adoption in Pennsylvania are those, and none other, that would exist upon the creation of the same artificial relation in this State.

We are of opinion, therefore, that upon the death of Samuel Sankey without other children, the estate in Illinois descended to appellee, Caroline C. Sankey, as his child and heir-at-law, and that the court correctly decreed in dismissing the original bill.

*Decree affirmed.*¹

¹ *Acc. Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596; *Ross v. Ross*, 129 Mass. 243; *Melvin v. Martin*, 18 R. I. 650, 30 Atl. 467. See *Stoltz v. Doering*, 112 Ill. 234. — Ed.

SECTION IV.

GUARDIANSHIP OF THE PERSON.

NUGENT v. VETZERA.

CHANCERY. 1866.

[Reported Law Reports, 2 Equity, 704.]

MOTION on behalf of the defendant, Albin Vetzera, that an order appointing the plaintiff Mrs. Nugent and her husband, and the Countess Gifford, as guardians of the infant plaintiffs during their respective minorities, might be discharged, and that such guardians might be ordered to deliver up the infants, who were Austrian subjects, to the custody of Signor Vetzera, their guardian duly constituted by the Imperial and Royal (Austrian) Consular Court at Constantinople; and also on behalf of the infant defendants, that an order directing that plaintiffs should be at liberty to serve the bill upon them out of the jurisdiction, might be discharged.

The facts were shortly as follows:—

The father of the infant plaintiffs and defendants, Signore Theodore Baltazzi, was a Greek by birth, but an Austrian subject, and carried on the business of a banker at Constantinople until his death in June, 1860. By his wife, who was an Englishwoman, and a member of the Church of England, he had ten children, all of whom survived him and were still under twenty-four, the age of majority according to the Austrian law. Signor Baltazzi died intestate, and administration of his estate, which was very considerable, was granted to his widow by the Austrian Consular Court at Constantinople, and she, and Etienne Mavrocordato, were also appointed by that tribunal guardians of the persons of the intestate's infant children.

Early in 1863 Madame Baltazzi contracted a second marriage with Mr. Alison, Her Britannic Majesty's envoy in Persia, and about the same time Etienne Mavrocordato resigned his office of guardian, upon which Signor Albin Vetzera (the defendant now moving), the secretary to the Austrian Embassy at Constantinople, was appointed one of the guardians in his place. Upon the death of their mother, Mrs. Alison, in December, 1863, Epaminondas de Baltazzi was appointed guardian of the children in her place. In July, 1865, Epaminondas de Baltazzi resigned his office of guardian, partly (as it was alleged) from differences between himself and Albin Vetzera as to the management of the children and administration of the intestate's property, of which they were joint "curators" or trustees, but principally from his being unable to comply with the direction of the Consular Court ordering him to fix his residence at Vienna for the purpose of having the children educated there.

On the 24th of July, 1865, the resignation of de Baltazzi was accepted, and by a decree of the Austrian Consular Court of the same date, Vetzera was appointed sole guardian of the children, with a direction that they should be brought up in the religion of their father, and sent as soon as possible to Vienna “in order to receive their education in that city, the only mode of awakening and consolidating the sentiments of faithful Austrian subjects.”

It appeared that Madame Baltazzi was always most anxious that her children should receive an English education, and, with the consent of her husband, they were all brought up as members of the Church of England. Two of the girls were sent to school in England during his lifetime, and in 1861 the eldest boy was sent over to this country, and in 1862, after the marriage of the eldest daughter to Mr. Nugent, a gentleman living in London, two more boys and two of the girls were brought over from Constantinople to England under the care of Countess Gifford, and were now being educated in this country, spending their holidays with their married sister, Mrs. Nugent.

The state of the family, and the ages and residences of the children at the time of filing the bill (December, 1865) will appear from the following tabular statement:—

Residing in England.

Mrs. Nugent, the plaintiff, who was married in 1862 to Albert Llewellyn Nugent (a nephew of Field Marshal Count Nugent)	23
Alexandre (now at Eton)	16
Hector (at Rugby)	15
Aristides (preparatory school at Cheam)	14
Eveline { at Mrs. Watson's school in Gloucester Crescent, }	12
Charlotte { Hyde Park }	11

Residing at Constantinople.

Helen (wife of Signor Albin Vetzera)	19
Mary	17
Henry	8
Julia	5

After the resignation of Epaminondas de Baltazzi, Mrs. Nugent petitioned the Consular Court, but without success, for the appointment of herself as guardian over her infant brothers and sisters, and in the meantime Vetzera announced his intention of removing one of the boys and the two girls from England, and sent over a confidential female servant to take care of them during their journey to Constantinople. Mr. and Mrs. Nugent refused to let the children go, and acting upon the circumstance that a portion of the intestate's estate (£160,000) was invested in consols and in India 5 per cents, they had, on the 2d of December, 1865, filed this bill for the purpose of

making the infants wards of court, securing the trust funds in this country for their benefit, and having guardians appointed, and a proper scheme for their maintenance settled by the court.

On the 13th of December, 1865, an order was obtained for service of the bill upon the defendants out of the jurisdiction, viz.: Albin and Helen Vetzera, the three infants, Mary, Henry, and Julia Baltazzi, living with them at Constantinople, and Mr. Gilbertson, who was one of the trustees of Mrs. Nugent's marriage settlement.

On the 19th of December, 1865, an order was obtained appointing Mr. and Mrs. Nugent and the Countess Gifford guardians of the infant plaintiffs, and giving liberty to serve a copy of the order upon the defendant Albin Vetzera at Constantinople.

Against these orders the present motion was made on behalf of the defendant Albin Vetzera.

In the meantime, on the 22d of December, 1865, an order was made by the Austrian Consulate, on the petition of Vetzera, authorizing him to suspend all further payments of the allowance to the infants for the purpose of their education in England, until they should have been put under the control of their guardian, and also of Mrs. Nugent's allowance, until she should have ceased to interfere in the affairs of the guardianship.

Against this order, and that, by which her petition, that she might be appointed guardian, was refused, Mrs. Nugent had appealed to the Supreme Court of Vienna.

In his affidavit filed in support of the present motion, the defendant Vetzera stated that he was dissatisfied with the progress made by Eveline and Charlotte with their schoolmistress, and also that he considered it to be his duty as guardian to obey the directions of the Austrian Consular Court, and remove the infants from England. For that purpose he had made arrangements that Eveline and Charlotte should reside with himself and his wife at Constantinople, and a competent governess for their education at his own house was already engaged. With regard to the boys, he proposed to place one of them (Hector) with a gentleman and his wife, of the highest respectability, residing in Austria, but stated that he had no present intention of removing Alexandre and Aristides from where they now were, though he considered it of the greatest importance that the boys "should have the advantage of an Austrian education, to qualify them hereafter for that position to which, from their rank and fortune, they would as Austrian subjects in Austria naturally aspire."

Evidence was also given as to the jurisdiction over infant Austrian subjects exercised by the Austrian courts, and by them committed to the guardians.

The affidavits on behalf of the plaintiffs in favor of keeping the children in England, need not be stated in detail, as they were directed to the superiority of an English public school education, and English associations, over education at Constantinople, or even at Vienna.

Attention was also called in the affidavits to the strongly expressed and acted upon wish of the mother that the children should be brought up in England.¹

WOOD, V. C. As regards the more important matter in this case, a question of very great importance, but I think really of small difficulty, is raised. Having regard to the principles of international law, and the course that all courts have taken of recognizing the proceedings of the regularly constituted tribunals of all civilized communities, and especially of those in amicable connection with this country, it is impossible for me entirely to disregard the appointment of a guardian by an Austrian court over these children, who are Austrian subjects, and children of an Austrian father, merely because those who preceded Signor Vetzera in his guardianship have taken the course of sending the children over to this country for the purpose of educating them, seeing that he is now desirous of revoking that arrangement. I am now asked in effect to set aside the order of the Austrian court, and declare that this gentleman so appointed cannot recall his wards who have been sent to this country for the purpose of their education. It would be fraught with consequences of very serious difficulty, and contrary to all principles of right and justice, if this court were to hold that when a parent or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this court might be of opinion that an English course of education is better than that adopted in the country to which they belong. I cannot conceive anything more startling than such a notion, which would involve on the other hand this result, that an English ward could not be sent to France for his holidays without the risk of his being kept there and educated in the Roman Catholic religion, with no power to the father or guardian to recall the child. Surely such a state of jurisprudence would put an end to all interchange of friendship between civilized communities. What I have before me is nothing more or less than that case.

Now, it appears to me plain, that I must take these children as remaining in this country only with the sanction of Signor Vetzera, and without any interference on the part of the Austrian court. Then at a proper time he wishes to recall them from England. Of course if there had been no application to this court no one can doubt the course which things would have taken. He being sole guardian, when he thought the children had been long enough at school in England would take them, if he thought fit, from this country and they would be removed.

[His Honor, after stating the filing of the bill and the appointment of guardians in England who wished to retain the children in this country, continued : —]

¹ Arguments of counsel are omitted. — ED.

This application being made, it is now sought to prevent Signor Vetzera from removing the children so sent to this country for their education, on the plea that this court has appointed guardians here in England (for which the jurisdiction is not to be disputed), and that having so appointed them, the court will do no more than look at what is most for the benefit of the infants.

Lord Bute's Case, 9 H. L. C. 440, is cited for the purpose of showing that I ought, if satisfied that it is more for the interest of the infants that they should remain here than be sent back to their own country, to supersede the authority of the foreign guardian and the authority of the court that has appointed him, which takes care of the education of its own subjects, and directs how it shall be carried into effect. It appears to me that no doctrine of that kind was in any way propounded in Lord Bute's Case, and certainly the other authority referred to, of *Dawson v. Jay*, 3 D. M. & G. 764 (called the American case), has no bearing upon the subject. Lord Cranworth there puts his decision on the ground that the child turned out to be a British subject, and that he had no authority to send a British subject out of the realm. In Lord Bute's Case the young marquis was a subject of the United Kingdom, and had very large property in England as well as in Scotland, and the question was, between the English and Scotch guardians, to which class the Crown, as *parens patriæ*, having full power to deal with the matter, should assign him. Can that be compared with a case in which the question is, whether I, sitting here as a judge in this country, am to decide whether or not the courts of the Emperor of Austria have rightly decided upon the mode in which they wish their subjects to be educated? The proposition is entirely beyond all reason, and this court would be exceeding very largely the judicious exercise of the powers which every tribunal has in an independent country over those who may be within its control and jurisdiction, if it attempted to form a judgment whether or not it was more expedient that these children, who are Austrian subjects, should be brought up in England rather than in Austria. The case apparently nearest in principle, perhaps, though not, on examination, to be compared with it, is that in which a Roman Catholic parent abandoning his child to Protestant instruction for several years, has sought to change its course of education and bring it back to his own form of religion. There the court would not allow the child's religious principles to be disturbed by changing the course of instruction under which it had so long been allowed to remain, holding that the father had, in effect, abandoned his right of choice. But that is not the case here. I see nothing on the facts to induce me to suppose that either this gentlemen as guardian, or the courts of Austria, in exercise of their rights over their own subjects, have at all abandoned these children, merely because they have allowed them to be educated for some four or five years in this country, where it was thought they could best be educated. To hold otherwise would render it most unwise for any foreign country to send her subjects to this country, as this court might say that the Queen of

England, as *parens patriæ*, can see to the education of children better than the Emperor of Austria, as *parens patriæ* within his own dominions, can. The same authority which we claim here on behalf of the Crown as *parens patriæ*, is claimed by every other independent State, and should not be interfered with except on some grounds which I do not think it necessary to specify, guarding myself, however, against anything like an abdication of the jurisdiction of this court to appoint guardians. With respect to the English guardians of these children I hold that the court has power to appoint them, and I continue those that have been appointed. The case may well happen of foreign children in this country without any one to look after or care for them, or who may require the protection of this court to save them from being robbed and despoiled by those who ought to protect them. These children, on the other hand, seem to have met with nothing but kindness from their relations on all sides, but it may be desirable that, so long as they remain in this country, they should have the protection of guardians living within the jurisdiction. Out of respect to the authority of the Austrian courts, by which this gentlemen has been appointed, I reserve to him, in the order I am about to make, all such power and control as might have been exercised over these children in their own country if they were there, and had not been sent to England for a temporary purpose. Taking that view of the case I have not asked to see the children. I could not be influenced by anything I might hear from them. I assume that they are most anxious to remain here, and not to go back to their own country, but I have no right to deprive the guardian appointed by the foreign court over them of the control which he has lawfully and properly acquired, has never relinquished and never abandoned, and under which authority alone they have remained here, and been maintained and supported here.

As regards the service of the bill on those children who are out of the jurisdiction, I must take it on the present bill, as no demurrer has been filed, that the order has been properly made. It is alleged that all the debts, funeral, and testamentary expenses of the testator have been paid, that part of his property is invested in this country, and that by the law of Austria these funds are divisible in given shares among the plaintiffs, and other children abroad who are interested in them, and therefore it has been thought right that they should be served with a copy of the bill, in order that they may come in in respect of their interest in the stock. I should be the more indisposed to disturb that order, as it is not asked to grant any proceeding against them, but that they should come in upon their common interest with the plaintiffs. I think, therefore, as things stand on the present state of the record, that I am not at liberty to discharge that order, and it follows, as a mere matter of course, that I ought to appoint a guardian *ad litem* for the purpose of answering.¹

¹ Compare Dawson v. Jay, 3 D. M. & G. 764; Johnstone v. Beattie, 10 Cl. & F. 150; Stuart v. Marquis of Bute, 9 H. L. C. 440. — Ed.

WOODWORTH v. SPRING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1862.

[*Reported 4 Allen, 321.*]

HABEAS CORPUS. The petitioner claimed the custody of Edward Spring, a minor of the age of eleven years, whose father and mother were residents of Chicago, Illinois, until their death, after which the petitioner, who is not a relative of the child, was appointed as his guardian under the laws of that State. The respondent, who is the child's aunt, brought him to this commonwealth in 1856, with the consent of the petitioner; and, in June, 1858, she was appointed as his guardian, without the knowledge of the petitioner, by the judge of probate of Berkshire County, where she resided. The present writ was brought by the petitioner for the purpose of asserting his right to the custody of the person of the child.

At the hearing before the chief justice, the respondent contended that the guardianship in Illinois could have no such effect or operation in this commonwealth as to entitle the petitioner to claim, on the facts stated, the right to the custody of the person of the child; and that if under other circumstances the petitioner could have such right, it was defeated by the appointment of the respondent as guardian in this commonwealth, by virtue of which she had the right to the custody of the person of the child; and these questions were reserved for the determination of the whole court.

The case was argued in September, 1861.

BIGELOW, C. J. The child whose custody is in controversy in this case, is legally domiciled in the State of Illinois. That was his domicil of origin; and as he has had, hitherto, no legal capacity to acquire a new one, and as the guardian appointed in the place of his origin has never intended to change the domicil of his ward, that of his birth still continues. Story, Conf. Laws, § 46. In determining the question of his legal custody in this commonwealth, he is therefore to be regarded as a foreign child who is lawfully within the jurisdiction of this State, having been brought within its limits, not forcibly or clandestinely, but with his own consent and with that of the petitioner, his duly appointed guardian under the laws of Illinois, who had the lawful custody of his person in that State. So much seems to be clear; and if the right to the possession and control of the person of the child depended on his domicil, the right of the petitioner to claim the custody of his person would be indisputable. But we are unable to see that the facts that the child was born in another State, and that he has never by an act or election of his own or of his guardian obtained a new home here, have a decisive bearing on the question at issue in the present case. He is now lawfully within the territory and under the jurisdiction of this commonwealth, and has a right to claim the protection and

security which our laws afford to all persons coming within its limits irrespective of their origin or of the place where they may be legally domiciled. Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign State cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government. Effect may be given by way of comity to such laws by the judicial tribunals of other States and countries; but, *ex proprio vigore*, they cannot have any extraterritorial force or operation. The question whether a person within the jurisdiction of a State can be removed therefrom depends, not on the laws of the place whence he came or in which he may have his legal domicile, but on his rights and obligations as they are fixed and determined by the laws of the State or country in which he is found. The master, who, in his own country, has property in the person of a slave, and unlimited control over his services, cannot, in the absence of a constitutional provision having the force of paramount law, enforce his rights in a State where slavery is not recognized as a lawful domestic relation. The comity of a State will give no effect to foreign laws which are inconsistent with or repugnant to its own policy, or prejudicial to the rights and interests of those who are within its jurisdiction. Even the parental relation, which is everywhere recognized, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted. The *patria potestas* of a foreign parent over his child is not that which is vested in him by the laws of the place of his domicile, but that which exists by virtue of the parental relation in the country where the father seeks to enforce his authority. These well settled principles are founded on the necessity of securing and preserving to every State the exclusive sovereignty and jurisdiction within its own territory, and avoiding the confusion and conflict of rights and remedies which would ensue from attempting to give extraterritorial effect to the varying laws of different countries. *Statuta suo cluduntur territorio nec ultra territorium disponunt.* Every nation has an exclusive right to regulate persons and property within its jurisdiction according to its own laws, and the principles of public policy on which its own government is founded. It results from these principles, that persons exercising offices and trusts with which they are clothed by virtue of the laws of a particular State or country, cannot undertake to transfer their power or capacity to act, so as to control persons or property situated beyond the limits of the jurisdiction of the government or sovereignty from which their authority is derived. An administrator appointed under the laws of a foreign State cannot act as such in this commonwealth. Nor, for like reasons, can a guardian appointed by virtue of the statutes of another State exercise any authority here over the person or property of his ward. His rights and powers are strictly local, and circumscribed by the

jurisdiction of the government which clothed him with the office. Story, Conf. Laws, § 499; Morrell v. Dickey, 1 Johns. Ch. 153; Kraft v. Wickey, 4 Gill & Johns. 322; Johnstone v. Beattie, 10 Cl. & Fin. 42, 113, 145. So far, therefore, as the claim of the petitioner to the custody of the child in the present case rests on a supposed rightful authority to control his person in this commonwealth, by virtue of his appointment as guardian in the State of Illinois, it is not supported either on principle or authority. He cannot assert his tutorial power, *de jure*, in our courts or within our territory.

But it by no means follows that his claim to the care of the child and the control of his person, and to the privilege of removing him from this commonwealth, is to be absolutely denied. On the contrary, it is the duty of the courts of this State, in the exercise of that comity which recognizes the laws of other States when they are consistent with and in harmony with our own, to consider the status of guardian which the petitioner holds under the laws of another State as an important element in determining with whom the custody of the child is to continue. It would not do to say that a foreign guardian has no claim to the care or control of the person of his ward in this commonwealth. If such were the rule, a child domiciled out of the State, who was sent hither for purposes of education, or came within the State by stealth, or was brought here by force or fraud, might be emancipated from the control of his rightful guardian, duly appointed in the place of his domicil, and thus escape or be taken out of all legitimate care and custody. But in such cases the foreign guardian would not be regarded here as a stranger or intruder. His appointment in another State as guardian of an infant, with powers and duties similar to those which are by our laws vested in guardians over the persons of their wards, would entitle him to ask that the comity of friendly States having similar laws and usages should be so far recognized and exerted as to surrender to him the infant, so that he might be again restored to his full rights and powers over him, by removing him to the place of his domicil. And if it should appear that such surrender and restoration would not debar the infant from any personal rights or privileges to which he might be entitled under our laws, and would be conducive to his welfare and promote his interests, it would be the duty of the court to award to the foreign guardian the custody of the person. This is the doctrine substantially stated by Lord Langdale in Johnstone v. Beattie, *ubi supra*, and confirmed in a subsequent judgment in the case of Stuart v. Moore, in the House of Lords, as reported in 4 Law Times (N. S.), 382.

Nor can we see that the appointment of a guardian over the minor by the probate court in this commonwealth operates to bar any decree by this court in favor of the foreign guardian, awarding to him the custody of his ward. Such an appointment might be expedient and proper for the purpose of clothing some one in this commonwealth with authority over the person of an infant for his protection and security

against any unauthorized interference or control. But it certainly would not conclusively settle his permanent status or condition so long as he remained an infant, or prevent his being removed from the Commonwealth by the guardian appointed in the place of his domicile, if the interests and welfare of the ward rendered such removal expedient or necessary. No doubt, so long as the child continues within this jurisdiction, the guardian appointed in the courts of this State would have the exclusive right to the custody of his person. But the decree of the probate court does not deprive this court of the power to adjudicate and determine the question of the proper custody of the child as between a domestic guardian and one appointed in the place of the domicile of the infant. The jurisdiction of this court to decide, on *habeas corpus* or other proper process, concerning the care and custody of infants, is paramount, and cannot be taken away by any decree of an inferior tribunal. *Commonwealth v. Briggs*, 16 Pick. 203. The result is, that neither of the parties to the present proceeding can assert or maintain an absolute right to the permanent care and custody of the infant who is now before the court. But it is for this court to determine, in the exercise of a sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, to whose custody he shall be committed. The case must therefore stand for future disposition.¹

A. v. B.

SUPREME COURT OF AUSTRIA. 1881.

[Reported 19 *Sammlung von Civilrechtlichen Entscheidungen*, 238.]

THE Court of Appeal delivered the following opinion in this case :

It is admitted by all parties that the plaintiff A. and her former husband B. are Bavarian subjects ; and that by a decree, confirmed by the Supreme Court, the royal Bavarian District Court at Bamberg on April 16, 1879, dissolved the bonds of marriage existing between A. and B., declared B. the sole guilty party, and condemned him to pay the amount due by agreement or by law to A. at his death, and a like portion for the child. No decree was made, however, as to the guardianship and education of the child born of the dissolved marriage. A. now, alleging that B. during the progress of the suit secretly carried off their seven-year-old son William, came with him to Vienna, and established a domicile in the judicial district of Neubau, brought suit in the City Court of Neubau, and in accordance with the terms of sections 4 and 34 of the Civil Code demanded the application of the Bavarian law as to the custody of the child in case of divorce, and, by its terms,

¹ See *Kelsey v. Green*, 69 Conn. 291, 37 Atl. 679 ; *In re Rice*, 42 Mich. 528, 4 N. W. 284 ; *Townsend v. Kendall*, 4 Minn. 412. — Ed.

a decree of the court for the surrender of the seven-year-old son William, born during the existence of the marriage, into her guardianship and care with full powers.

Since the competence of the Austrian City Court of Neubau was not disputed by either party, the case depends first of all on the question whether in the decision upon the demand of A. the Bavarian law should be applied, or whether the decision is to be given only in accordance with the Austrian law.

The City Court in the decree from which A. has appealed held that the Bavarian law cannot be applied, in view of section 4 of the Civil Code: since the cases where a foreign law may be applied are exclusively determined by sections 34 to 37 of the Civil Code; and in all these cases it is a question of deciding the personal capacity of foreigners for contracting, or the validity of contracts themselves, but not the legal consequences of other facts, such as the consequences of dissolution of marriage in Bavaria.

We cannot agree with this decision of the lower court, for though sections 34 to 37 of the Civil Code contain no express provisions with respect to the determination of the legal results of a status, yet it cannot be doubted that in a case where the dissolution of a former status, as here the dissolution of the marriage between A. and B., follows the Bavarian law, the effects and results of this dissolution of marriage, a Bavarian act, are also to be decided according to the Bavarian law; especially in this case, where both spouses are Bavarian subjects, the dissolution of the marriage was decreed by Bavarian courts and by application of Bavarian law, and both spouses were at the time domiciled in Bavaria. The legal consequences resulting from the dissolution of marriage according to the Bavarian law followed, in Bavaria, immediately at the time of the legal act of divorce; and the circumstance that B. also changed his residence and acquired a domicile in Vienna makes no difference in the establishment of the legal consequences, such as the rights with respect to custody of the child, already created by Bavarian law as a result of the dissolution of the marriage, and, for instance, cannot deprive A. of her right already created by that law. The present residence of B. in Vienna has the consequence only that A. must enforce her right to the custody of the child, resulting, by the Bavarian law, from the aforesaid legal dissolution of status, in the Austrian courts, and according to Austrian procedure; but the petition she brings is to be investigated and adjudged according to the Bavarian law.

By the official certificate of the Bavarian Minister of Justice, dated August 15, 1880, it is proved that the Bavarian law contains no express provision about the right to the custody of children in case of dissolution of a marriage by divorce; and therefore the common law has subsidiary value as supplying the omission in the Bavarian law. Accordingly it is further stated in a supplementary official certificate of the Bavarian Minister of Justice, dated September 14, 1880, that

the provisions of the Roman law in Novel 117, cap. 7,¹ are in force both in theory and in practice as a still existing principle of the common law, brought into use as subsidiary law to piece out the Bavarian law. It is further shown in the same official certificate that the Roman law, that is, Novel 117, cap. 7, is in this case identical with the common law. Furthermore, from the interpretation of the text of this Novel cited in the transaction, an interpretation which neither side disputes, it follows clearly and undoubtedly that in case of a divorce the right of custody of children born of the marriage belongs to the party who is not to blame for the separation. Finally in the legal decree of divorce granted by the Bavarian court B. is declared the sole guilty party. The petitioner A., therefore, according to this Novel which is in force in Bavaria as subsidiary law, has the right, as a result of the legal decree of divorce in the Bavarian court, to the custody of the child born of the marriage, so long as she herself does not marry again. She is therefore entitled to claim that her seven-year-old son William be taken away from her late husband B. and handed over to her custody and care.

The Supreme Court affirmed the decision of the Court of Appeal for the appropriate and legal reasons stated by them.

SECTION V.

INCORPORATION.

BANK OF AUGUSTA v. EARLE.

SUPREME COURT OF THE UNITED STATES. 1839.

[*Reported 13 Peters, 519.*]

TANEY, C. J.² The questions presented to the court arise upon a case stated in the Circuit Court in the following words:—

“The defendant defends this action upon the following facts, that are admitted by the plaintiffs: that plaintiffs are a corporation, incorporated by an act of the legislature of the State of Georgia, and have power usually conferred upon banking institutions, such as to purchase

¹ Illud quoque disponendum esse perspeximus, ut si quando inter maritum et uxorem nuptias solvi contigerit: ex huiusmodi nati filii, nullo modo, laedantur ex separatione nuptiarum, sed ad parentum hereditatem vocentur, ex patris substantia indubitanter alendi. Et si quidem pater occasionem separationis praebeat, et mater ad secundas non venerit nuptias: apud matrem nutriantur, expensas patre praebente. Si vero per causam matris ostendatur solum matrimonium: tunc apud patrem maneat filii, et alantur. Si autem contigerit patrem quidem minus idoneum esse, matrem vero locupletem: apud eam pauperos filios manere et ab ea nutriri iubemus.

² Part of the opinion of the court only is given. M'KINLEY, J., delivered a dissenting opinion.—ED.

bills of exchange, etc. That the bill sued on was made and indorsed, for the purpose of being discounted by Thomas M'Gran, the agent of said bank, who had funds of the plaintiffs in his hands for the purpose of purchasing bills, which funds were derived from bills and notes discounted in Georgia by said plaintiffs, and payable in Mobile; and the said M'Gran, agent as aforesaid, did so discount and purchase the said bill sued on, in the city of Mobile, State aforesaid, for the benefit of said bank, and with their funds, and to remit said funds to the said plaintiffs.

“If the court shall say that the facts constitute a defence to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest, and cost; either party to have the right of appeal or writ of error to the Supreme Court upon this statement of facts, and the judgment thereon.”

Upon this statement of facts the court gave judgment for the defendant; being of opinion that a bank incorporated by the laws of Georgia, with a power among other things to purchase bills of exchange, could not lawfully exercise that power in the State of Alabama; and that the contract for this bill was therefore void, and did not bind the parties to the payment of the money.

It will at once be seen that the questions brought here for decision are of a very grave character, and they have received from the court an attentive examination. A multitude of corporations for various purposes have been chartered by the several States; a large portion of certain branches of business has been transacted by incorporated companies, or through their agency; and contracts to a very great amount have undoubtedly been made by different corporations out of the jurisdiction of the particular State by which they were created. In deciding the case before us, we in effect determine whether these numerous contracts are valid or not. And if, as has been argued at the bar, a corporation, from its nature and character, is incapable of making such contracts; or if they are inconsistent with the rights and sovereignty of the States in which they are made, they cannot be enforced in the courts of justice.

Much of the argument has turned on the nature and extent of the powers which belong to the artificial being called a corporation and the rules of law by which they are to be measured. On the part of the plaintiff in error, it has been contended that a corporation composed of citizens of other States are entitled to the benefit of that provision in the Constitution of the United States which declares that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;” that the court should look behind the act of incorporation, and see who are the members of it; and, if in this case it should appear that the corporation of the Bank of Augusta consists altogether of citizens of the State of Georgia, that such citizens are entitled to the privileges and immunities of citizens in the State of Alabama; and as the citizens of Alabama may unquestionably purchase

bills of exchange in that State, it is insisted that the members of this corporation are entitled to the same privilege, and cannot be deprived of it even by express provisions in the constitution or laws of the State. The case of the Bank of the United States *v.* Deveaux, 5 Cranch, 61, is relied on to support this position.

It is true, that in the case referred to, this court decided that in a question of jurisdiction they might look to the character of the persons composing a corporation; and if it appeared that they were citizens of another State, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the courts of the United States. But in that case the court confined its decision, in express terms, to a question of jurisdiction; to a right to sue; and evidently went even so far with some hesitation. We fully assent to the propriety of that decision; and it has ever since been recognized as authority in this court. But the principle has never been extended any farther than it was carried in that case; and has never been supposed to extend to contracts made by a corporation, especially in another sovereignty. If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any State in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to the citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself. Besides, it would deprive every State of all control over the extent of corporate franchises proper to be granted in the State; and corporations would be chartered in one to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question. Whenever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State; and we now proceed to inquire what rights the plaintiffs in error, a corporation created by Georgia, could lawfully exercise in another State; and whether the purchase of the bill of exchange on which this suit is brought was a valid contract, and obligatory on the parties.

The nature and character of a corporation created by a statute, and

the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court.

In the case of *Head and Amory v. The Providence Insurance Company*, 2 Cranch, 127, Chief Justice Marshall, in delivering the opinion of the court, said, "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.

"To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record."

In the case of *Dartmouth College v. Woodward*, 4 Wheat. 636, the same principle was again decided by the court. "A corporation," said the court, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."

And in the case of *the Bank of the United States v. Dandridge*, 12 Wheat. 64, where the questions in relation to the powers of corporations and their mode of action were very carefully considered, the court said, "But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation; corporations created by statute must depend both for their powers and the mode of exercising them, upon the true construction of the statute itself."

It cannot be necessary to add to these authorities. And it may be safely assumed that a corporation can make no contracts, and do no acts either within or without the State which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner as the charter authorizes. And if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the State, all contracts made by it in other States would be void.

The charter of the bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and, consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another State. The power thus given clothed the corporation with the right to make contracts out of the State, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another State; and the general power to purchase bills without any restriction as to place, by its fair and natural import, author-

ized the bank to make such purchases, wherever it was found most convenient and profitable to the institution; and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that State could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction.

But it has been urged in the argument, that notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the State; that the laws of a State can have no extra-territorial operation; and that as a corporation is the mere creature of a law of the State, it can have no existence beyond the limits in which that law operates; and that it must necessarily be incapable of making a contract in another place.

It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *The United States v. Amedy*, 11 Wheat. 412, and in *Beaston v. The Farmer's Bank of Delaware*, 12 Peters, 135. Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?

The corporation must, no doubt, show that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence, as an artificial person, in the State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

Every power, however, of the description of which we are speaking,

which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed: whether, by the comity of nations and between these States, the corporations of one State are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's *Conflict of Laws*, p. 37, that "in the silence of any positive rule; affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts, since the case *Henriquez v. The Dutch West India Company*, decided in 1729, 2 L. Raymond, 1532. And it is a matter of history, which this court are bound to notice, that corporations created in this country have been in the open practice for many years past of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract, by which an American cor-

poration had borrowed money in England; yet if the contracts of corporations made out of the State by which they were created, are void, even contracts of that description could not be enforced.

It has, however, been supposed that the rules of comity between foreign nations do not apply to the States of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The court think otherwise. The intimate union of these States, as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity and friendship and kindness towards one another than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these States? They are sovereign States, and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one State, by a corporation created in another. The numerous banks established by different States are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other States, and suffered to make contracts without any objection on the part of the State authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced in by the States, that the court cannot overlook them when a question like the one before us is under consideration. The silence of the State authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another State. But we are not left to infer it merely from the general usages of trade and the silent acquiescence of the States. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion, that it has been decided in many of the State courts, we believe in all of them where the question has arisen, that a corporation of one State may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that

power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty — where the last mentioned power does not come in conflict with the interest or policy of the State? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied.

We turn in the next place to the legislation of the States.

So far as any of them have acted on this subject, it is evident that they have regarded the comity of contract, as well as the comity of suit, to be a part of the law of the State, unless restricted by statute. . . .

We think it is well settled that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public, and well known and long continued usages of trade, the general acquiescence of the States, the particular legislation of some of them, as well as the legislation of Congress, all concur in proving the truth of this proposition.

But we have already said that this comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made. And it remains to inquire whether there is anything in the constitution or laws of Alabama from which this court would be justified in concluding that the purchase of the bill in question was contrary to its policy.¹ . . .

When a court is called on to declare contracts thus made to be void upon the ground that they conflict with the policy of the State, the line of that policy should be very clear and distinct to justify the court in sustaining the defence. Nothing can be more vague and indefinite than that now insisted on as the policy of Alabama. It rests altogether on speculative reasoning as to her supposed interests, and is not supported by any positive legislation. There is no law of the State which attempts to define the rights of foreign corporations.

We, however, do not mean to say that there are not many subjects upon which the policy of the several States is abundantly evident, from

¹ The learned judge here examined the legislation of Alabama and the decisions of the Supreme Court of the State, and found no reason to doubt that Alabama had adopted "the law of international comity." — ED.

the nature of their institutions and the general scope of their legislation, and which do not need the aid of a positive and special law to guide the decisions of the courts. When the policy of a State is thus manifest, the courts of the United States would be bound to notice it as a part of its code of laws, and to declare all contracts in the State repugnant to it to be illegal and void. Nor do we mean to say whether there may not be some rights under the Constitution of the United States which a corporation might claim under peculiar circumstances, in a State other than that in which it was chartered. The reasoning, as well as the judgment of the court, is applied to the matter before us, and we think the contracts in question were valid, and that the defence relied on by the defendants cannot be sustained.

The judgment of the Circuit Court in these cases must therefore be reversed with costs.¹

¹ *Acc. Bateman v. Service*, 6 App. Cas. 386; *Thompson v. Waters*, 25 Mich. 214; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Bank v. Hall*, 35 Oh. St. 158; *Canadian Pac. Ry. v. W. U. Tel. Co.*, 17 Can. 151.

A foreign corporation may be expressly forbidden by statute to do an act; as by a general statute applying to all corporations, foreign or domestic. *P. v. Howard*, 50 Mich. 239; *Bard v. Poole*, 12 N. Y. 495. So it may not do an act for doing which a special franchise is required. *Dodge v. Council Bluffs*, 57 Ia. 560; *Middle Bridge Co. v. Marks*, 26 Me. 326. So it may not do any act which is against the public policy of the State: *American Col. Soc. v. Gartrell*, 23 Ga. 448; but in the absence of legislation forbidding the act, the case must be a very clear one before the court can say that the act is against public policy. *Cowell v. Springs Co.*, 100 U. S. 59; *Stevens v. Pratt*, 101 Ill. 206; *Thompson v. Waters*, 25 Mich. 214. In the last case, *CHRISTIANCY*, C. J., said: "The legislature are the proper representatives of the public interest, and having the exclusive power to determine what shall be the public policy of the State, if they have chosen to make no enactment upon the subject it is natural to infer they omitted to do so because they thought it unnecessary and that the generally recognized principles would be sufficient for such cases." The fact that the legislature has itself created no corporation with power to do the act is not enough to prove that it is against public policy for a foreign corporation to do it. *Cowell v. Springs Co.*, 100 U. S. 55; *Deringer v. Deringer*, 5 Houst. 416; but see *Empire Mills v. Alston Grocery Co.*, 4 Wills. (Tex.) 346, 15 S. W. 505. In acting within the State, the foreign corporation is, of course, at all times subject to the regulations and to the general laws of the State. *U. S. v. Fox*, 94 U. S. 315; *McGregor v. Erie Ry.*, 35 N. J. L. 115; *Southern L. Ins. & Tr. Co. v. Packer*, 17 N. Y. 51; *P. v. Coleman*, 135 N. Y. 231. Since a foreign corporation may be excluded from a State altogether, it may be admitted upon terms, as, for instance, that it will submit to the jurisdiction of the local courts. *Paul v. Virginia*, 8 Wall. 168; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727.

The mere fact that the corporation was formed in the foreign State by citizens of the domestic State, to do business solely in the latter State, does not make it incapable of acting. *Bangleman v. National W. W. Co.*, 46 Fed. 4; *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576; *Hanna v. International Petroleum Co.*, 23 Oh. St. 622. But where the legislature, in chartering a corporation to act in other States, forbade it to do any act in the State of charter, it was held incapable of acting in a foreign State. *Land Grant Ry. v. Coffey County*, 6 Kan. 245. *VALENTINE, J.*, said: "No rule of comity will allow one State to spawn corporations and send them forth into other States to be nurtured and do business there, when said first mentioned State will not allow them to do business within its own boundaries."

The corporation can do no act which it is not empowered to do by the State of its charter; no law of the foreign State, permitting such an act to be done by the corpora-

LIVERPOOL INSURANCE CO. v. MASSACHUSETTS.

SUPREME COURT OF THE UNITED STATES. 1870.

[Reported 10 Wallace, 566.]

ERROR to the Supreme Judicial Court of Massachusetts; the case being this:—

A statute of the State just named imposes upon “each fire, marine, and fire and marine insurance company, incorporated or associated under the laws of any government or State other than one of the United States, a tax of 4 per cent upon all premiums charged or received on contracts made in this Commonwealth for insurance of property.” The same statute imposes a tax of but 2 per cent upon such premiums when the company is incorporated under the laws of any one of the United States other than Massachusetts; upon which premiums, where the company is incorporated by itself, it imposes but 1 per cent; while no tax is imposed by the laws of the State upon the business of insurances transacted by any natural persons citizens of the same.

With the enactment just mentioned on its statute-book, the State of Massachusetts, in 1868, filed a bill in its Supreme Judicial Court against the Liverpool and London Life and Fire Insurance Company (a company doing a large business in that State), to collect a tax of 4 per cent on its premiums upon contracts made in Massachusetts for insurance of property, and to restrain the company from doing further business till the tax was paid. The company set up that it was not “incorporated” at all, but was an association, under the laws of Great Britain, of natural persons, some of whom were citizens and residents of the country just named; and some citizens and residents of the State of New York; formed for the purpose of conducting the business of insurance under certain deeds of settlement, and having the legal character of a partnership; that accordingly it could not be

tion within its territories, can confer the power to do it. *St. Louis V. & T. H. R. R. v. T. H. & I. R. R.*, 145 U. S. 393. As its powers are created, so the continuance of them is dependent on the will of the State of charter (subject to possible constitutional limitations). If the powers of a corporation are altered in that State, the effect of the alteration is felt wherever the corporation acts. *Canadian So. R. R. v. Gebhard*, 109 U. S. 527; *Relfe v. Rundle*, 103 U. S. 222. Therefore the existence of a corporation is determined solely by the law of the State of charter: *Importing and Exporting Co. v. Locke*, 50 Ala. 332; and if by that law the corporation has come to an end, it ceases to exist everywhere: *Remington v. Samana Bay Co.*, 140 Mass. 494. In the latter case

HOLMES, J., said: “Would it not be a most extraordinary spectacle if, when a *de facto* government . . . had made a decree dissolving a corporation, and its decree had been accepted as valid by all succeeding governments of the country having exclusive power and jurisdiction over the matter, the courts of another State should undertake to assert that the corporation existed under the laws of that country, in spite of their repudiation and denial? . . . That fiction or artificial creation is wholly within the power of its creator, and persons who deal with it must be taken to understand that it is so.” — ED.

taxed as a "company incorporated under the laws of any government or State other than one of the United States;" while, in so far as the discriminating tax of 4 per cent was sought to be laid against it as a company associated simply and not incorporated, it violated, in regard to the members of the company who were subjects of Great Britain, a provision in the treaty of 1815, between that country and the United States, by which it is agreed that the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce; and—in regard to the citizens of New York, that provision in section 2, article 4, of the Federal Constitution, which secures to the citizens of each State all the privileges and immunities of citizens in the several States.¹

MILLER, J. The case of *Paul v. Virginia*, 8 Wall. 168, decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one State, having an agency by which it conducted that business in another State, was not engaged in commerce between the States.

It was also held in that case that a corporation was not a citizen within the meaning of that clause of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and that a corporation created by a State could exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by the comity and consent of the latter.

These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recog-

¹ Part of the statement of facts and the arguments of counsel are omitted. — ED.

nized by the act of Parliament which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, etc., and the demand for the use of corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed in all the States the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legislative ratification as is given by the acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that the fact that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

MR. JUSTICE BRADLEY. Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a corporation. I think it is one of those special partnerships which are called joint-stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint-stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

*Judgment affirmed.*¹

¹ *Acc. General S. N. Co. v. Guillon*, 11 M. & W. 877. — Ed.

CHAPTER XII.

PROPERTY.

WATERS v. BARTON.

SUPREME COURT OF TENNESSEE. 1860.

[*Reported 1 Coldwell, 450.*]

McKINNEY, J. The complainant, Elizabeth, is the only child of David A. Barton, who died in Texas, in December, 1844, leaving the complainant, his only distributee, then an infant of about eleven months old.

This bill was filed originally, in the name of her next friend, to recover two slaves, named Henry and Mack, claimed to have been the property of said D. A. Barton, who died intestate.

The allegations and proof, in regard to the ownership of said slaves, by David A. Barton, is contradictory. For the complainants, it is alleged that Joshua Barton, the father of David A., made a parol gift of the slaves to him. The defendants deny the gift, and allege that the slaves were merely loaned by the father to his son, for the period of two years, at the expiration of which time they were to be returned.

The proof shows, that in September, 1842, the intestate, David A., whose residence was in Texas, was on a visit to his father's family, who resided in Cannon County, Tennessee, and that, about to return home, Joshua Barton, his father, placed said two slaves in his possession, to take with him to Texas; that he did take them with him to his home, in Texas, where he arrived about the 15th of October, 1842; and that he retained possession of the slaves, and claimed them as his own property, from that date until his death, which happened on the 20th December, 1844, being a period of more than two years; and that after his death, they came into the possession of the administrator of his estate, who delivered them into the custody of the guardian of the complainant, with whom they remained until November, 1845, when by the procurement of Joshua Barton, they were enticed away and brought to Tennessee, and taken possession of by Joshua Barton, who claimed them as his property; and who, shortly afterwards, delivered the slave, Mack, into the possession of his son-in-law, the defendant, Ramsey, who still has him in his possession; and at a

later period, he disposed of Henry, to his son, the defendant, William, who still retains him.

Joshua Barton died in the spring of 1858; the defendant, William, is the personal representative of his estate, and the other defendants are the legatees and devisees under his will.

We do not deem it necessary to comment upon the conflicting testimony, in detail, with the view of sustaining our conclusion as to its effect. Suffice it to say, that upon a review of all the evidence, and more especially the declarations of Joshua Barton, as proved by Stokes and Farmer, at the time the slaves were brought back from Texas, in November, 1845, the preponderance of the proof, in our opinion, is, that the transaction was a gift, and not a loan, of the slaves, by Joshua Barton, to his son, David A.

This brings us to the question of law, arising upon the facts stated; namely: Whether or not, under the Statute of Limitations of Texas, David A. Barton acquired such a title to the slaves as will entitle the complainants, suing in his right, to recover them in the courts of this State.

By the Statute of Texas, suit must be commenced, in a case like this present, "within two years, next after the cause of such action, or suit, and not after." See Hartley's Dig., Art. 2377; and this statute "applies no less to foreign than to domestic claims." *Ib.*, Art. 2398.

In the construction of this statute, it has been declared by the Supreme Court of that State, that its effect is, not only to bar the rights of action of the former owner, but also to extinguish his right; and to vest the right of property absolutely in the adverse possession, so that if, after the bar had been completed, the former owner should regain the possession, the possessor might maintain an action against him for the recovery of the property. See 9 Tex. Rep. 123.

For the defendants, it is insisted, that, inasmuch as by the statute of this State, where the suit is brought, an adverse possession of three years is required to give title, under a void parol gift of slaves, our own law, and not that of Texas, must govern the decision of the case.

The counsel on both sides refer to Story's Conflict of Laws, § 582; but they differ in their understanding of the import of that authority.

The counsel for the defendants admit that if both parties had been resident within the jurisdiction of Texas, during the whole period prescribed by the law of that State, to complete the bar, the title thus acquired by the possessor might be set up by the complainants, in our courts, in the present case, and a recovery of the slaves be effected by force thereof.

But, forasmuch as Joshua Barton was a resident of Tennessee, and not subject to the jurisdiction or laws of Texas, during the period the slaves were in adverse possession of David A. Barton, in that State, it is denied that any such effect can be predicated of the statute of that State. Mr. Story put this case: Suppose personal property is adversely held in a State, for a period beyond that prescribed by the laws of that

State; and after that period has elapsed, the possessor should remove into another State, which has a longer period of prescription, or is without any prescription, could the original owner assert a title there against the possessor, whose title, by the local law, and the lapse of time, had become final and conclusive before the removal? It has certainly been thought, says the author, that, in such a case, the title of the possessor cannot be impugned. See section 582 and cases referred to in note 2.

The case supposed above, as we understand the author, is, in principle, precisely the present case. Every sovereignty possesses the undoubted power to regulate the rights of property situate within its own jurisdiction.

It may limit all rights of action to certain prescribed periods, and may ordain that, after the expiration of the periods thus prescribed, not only the right of action, but the claim or title likewise, shall be extinguished.

And if a positive title to property be then acquired and perfected by the local law of the place, where situate at the time, upon what sound principle can it be maintained that such title can be effected or defeated by the removal of the property to another country, by the possessor, or by its removal by another, without his consent?

In such a case, can it be material whether or not the former owner was resident within the jurisdiction, by whose local law the possessor had become vested with an absolute title to the property? If it be said that the former owner, by residing within the jurisdiction, during the period prescribed, voluntarily subjected himself to the operation of the local laws of the place, and therefore cannot complain that his right is taken away by those laws, as the result of his own laches, may it not be said with quite as much reason, and force of argument, that, by knowingly suffering his property to be taken, and to remain within the jurisdiction, during the period prescribed by the local law, he thereby voluntarily subjected his property and rights to the operation of such local laws?

In the latter case, as much as in the former, the loss of his right is the result of his own laches.

Our conclusion, therefore, is, that under the law of Texas, the title of Joshua Barton — though not a resident of that State — was extinguished, and the title perfected in David A. Barton; and that the title thus acquired may be set up by the complainants, in the courts of this State, against those claiming the slaves, by the subsequent disposition of them made by Joshua Barton.

*Decree affirmed.*¹

¹ *Acc.* *Shelby v. Guy*, 11 Wheat. 361; *Rabun v. Rabun*, 15 La. Ann. 471; *Sessions v. Little*, 9 N. H. 271; *Sleeper v. Pa. R. R.*, 100 Pa. 259. — *Ed.*

POND v. COOK.

SUPREME COURT OF ERRORS, CONNECTICUT. 1877.

[Reported 45 Connecticut, 126.]

PARK, C. J. The defendant was appointed a receiver of the insolvent Watson Manufacturing Company by the court in the State of New Jersey where the company was incorporated and its assets were located. The defendant under his appointment took possession of the property and assets of the company, and as receiver purchased the iron in question in this case, and had it prepared for the construction of a bridge between the towns of New Haven and Orange in this State. The iron was thus prepared in the State of New Jersey, whence he had it shipped to New Haven to his address as receiver. The Watson Manufacturing Company had previously made a contract with the towns of New Haven and Orange for the construction of the bridge, and what the defendant did was done to carry out and complete the contract, for the benefit of the creditors of the company.

Thus it appears that the property was in the possession of the defendant as receiver when it came into this State. He was invested with it, and was legitimately performing the duties of his appointment in completing the contract by its use when it was attached by the plaintiff. In these circumstances comity among the States requires that the case should be regarded by our courts precisely as it would have been by the courts of New Jersey if the controversy had arisen there. In the case of *Wales v. Alden*, 22 Pick. 245, an inhabitant of Boston being in New York, an assignment of goods and choses in action was made to him in trust for the benefit of the creditors of the assignors, who were inhabitants of New York. The trustee took possession of the property in New York, but did not move it out of the State. On his return to Boston he was served with process of garnishment by a creditor of the assignors living in Massachusetts. The claim of the creditor was based upon the assignment in New York. He insisted that by the maxim of law personal property follows the person, and that consequently the property assigned was with the trustee in Massachusetts; and that inasmuch as the assignment was made under the laws of New York, which had no effect in Massachusetts, he had obtained the prior right by his attachment. The court, in commenting upon this claim of the creditor, said: "The trustee took the goods for a lawful purpose, and by a title indefeasible where the transaction took place, and under the laws of New York, to which he was amenable. He was bound, as well in conscience as by law, to execute the trust according to the terms of the conveyance under which he took the property. His coming into this commonwealth ought not to defeat such a conveyance, and discharge him from his legal and conscientious obligations, even though it should be held

that, if such an assignment had been made here, it could not hold against attaching creditors." In the case of *Clark v. The Connecticut Peat Company*, 35 Conn. 303, a debt was attached in this State which was owed to creditors in Massachusetts, but which had previously been assigned in that State to a party residing there, and it was held that the assignment, being good by the law of Massachusetts, was good against the attaching creditor. Judge Hinman, in giving the opinion of the court, said: "If by the law of Massachusetts the plaintiff acquired a valid title as assignee of this debt by the assignment before the attachment here, how can that attachment in any way affect that title? When a legal title is once vested by a sale valid in the place where made, its validity should be recognized everywhere." See also *Mead v. Dayton*, 28 Conn. 33, and *Koster v. Merritt*, 32 Conn. 246.

But it is said that in the case at bar the receiver was appointed by the court in New Jersey, in conformity with the local law of the State, which had no authority beyond the limits of the State, and that consequently when the property came here it came free from all the right and title which the receiver had to it while it remained in the State of New Jersey. There would be force in this claim if the property was here when the receiver was appointed in New Jersey, and the receiver had never taken possession of it previous to the attachment by the plaintiff. In that case the local law of New Jersey could not vest property in the receiver which was located here. *Upton v. Hubbard*, 28 Conn. 274; *Paine v. Lester*, 44 Conn. 196; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353; *Willits v. Waite*, 25 New York, 577. And many other cases might be cited to the same effect. But when property has once vested in a trustee, assignee, or receiver, by the law of the State where the property is situated, it makes no difference whether it is done under the local law of the State or under the common law. The law of another State will not divest the trustee, assignee, or receiver of his right to the property, should he take it into such State in the performance of his duty. The courts of such State will inquire whether he has such right to the property when it comes into the State as between himself and their own citizens, but when the fact that he has such right is ascertained they will not regard it as important by what mode the right was acquired. In the case of *Crapo v. Kelly*, 16 Wall. 610, where personal property located in Massachusetts was transferred to an assignee by proceedings in insolvency under the local laws of that State, and the property afterwards being in New York was attached by a creditor of the insolvent residing there, it was held that the assignee had the prior right to the property. The case had been previously decided by the Court of Appeals in the State of New York. 45 New York, 86. Although the court came to a different result from the decision in *Wallace*, still the two courts harmonized, so far as the law under consideration is concerned. The only difference between that case and the one at bar consists in the fact that an assignee was appointed

in that case and a receiver in this. The case cited from the 22 Pickering scarcely differs from the present in any other respect. The court would not allow the fiction of law, everywhere established, and in no State more than in Massachusetts, that personal property follows the person, to give a preference to the attaching creditor. But the object to be accomplished by the appointment of an assignee in those cases, and a receiver in this, was the same. Each was appointed to settle the estate and divide the property among the creditors of the insolvent. Calling the administrator of the estate in such cases by different names does not alter his character or the nature of his duties. A receiver, appointed under the statute of New York, directing proceeding against insolvent corporations, is a standing assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. 4 Paige, 224. One of the modes in the State of New Jersey to settle the insolvent estate of a corporation, under their statute, is by the appointment of a receiver. And whether the title to the property in such case passes to the receiver or remains technically with the corporation, is a matter of no importance, so long as the property is taken from the corporation, and placed in the hands of the receiver, with full power, under the direction of the court, to settle the estate of the corporation. The plaintiff refers us to High on Receivers, and insists that a receiver has only the custody of the property committed to his keeping. But the author, in the references cited, is merely treating of receivers appointed *pendente lite*, under the ordinary powers of a court of chancery. Such references throw no light upon the pending question.

The statute of New Jersey under which this receiver was appointed authorizes proceedings against insolvent corporations, like the Watson Manufacturing Company, to settle their estates by dividing their property among their creditors in a similar manner to other insolvent statutes in other States where trustees are appointed. Obviously, in the State of New Jersey the property in question could not have been taken from the receiver by a creditor of the corporation; and we think it should not be done here. We think the case should be treated here precisely as it would have been by the courts of New Jersey if the controversy had arisen there.

The only remaining question to be considered is, whether the defendants have made full defence in the pending case. We think the cases of *Clark v. Gaylord*, 24 Conn. 484, *Fitch v. Chapman*, 28 Conn. 257, and *Dayton v. Merritt*, 33 Conn. 184, are decisive of this question in favor of the defendants, and further comment in regard to it is unnecessary.

We advise judgment in favor of the defendants.

In this opinion the other judges concurred.¹

¹ *Acc. Chicago M. & S. P. Ry. v. Packet Co.*, 108 Ill. 317; *Cagill v. Wooldridge*, 8 Baxt. 580. — Ed.

EDGERLY v. BUSH.

COURT OF APPEALS, NEW YORK. 1880.

[*Reported 81 New York, 199.*]

THIS action was brought for the alleged conversion of a span of horses.

The facts, as found by the referee, are as follows : —

One Stephen Baker was born in Lower Canada and resided there till 1873. In that year he went to Moriah, in New York, engaged there in business and resided there. While a resident of Moriah he executed to the plaintiff, a resident also of Moriah, on the 9th day of March, 1875, a chattel mortgage on property including the span of horses in question. This mortgage was duly filed March 10, 1875. The sum was payable in monthly instalments, the first payment to be made June 1, 1875. The mortgage contained a clause that in case of non-payment, or in case the mortgagor or any other person should remove, secrete, or dispose of the property, or if the mortgagee deemed it necessary, he might take possession, otherwise the property was to remain in the mortgagor's possession until the time for the first payment. No part of the sum secured has ever been paid. On the 10th of May, 1875, Baker returned to Lower Canada, taking the property with him, and there he has resided ever since. In November, 1875, at St. Jean Chrysostom, in Lower Canada, one Francis De Lisle, of that place, a regular trader, dealing in horses, sold the horses in question to one Bromley, a resident of Plattsburgh, in this State. Bromley made the purchase in good faith and in ignorance of the plaintiff's claim. The horses were in De Lisle's possession at the time and were at once delivered to Bromley and immediately brought by him to Plattsburgh. It does not appear how the horses came into the possession of De Lisle. On the 10th of December, 1875, Bromley learned that the plaintiff claimed to have a mortgage on the horses. To prevent their seizure, by the plaintiff, he immediately removed them to Canada for the purpose of trading back with De Lisle. On the 13th of December, 1875, in Canada, Bromley sold the horses to the defendant. At that time the defendant was a resident of this State. The horses in question remained in Canada, and since then they had not been brought into this State up to the time when this action was commenced. The defendant was informed by Bromley that he had run the horses into Canada to avoid a claim or seizure under a mortgage. Plaintiff made a demand for the horses but defendant refused to deliver. Plaintiff did not reimburse, or offer to reimburse to defendant, the amount paid by him or by Bromley for the horses. Under the laws of Lower Canada, if an article of personal property, lost or stolen, be sold in a fair or market, or at a public sale, or purchased from a trader dealing in similar articles, the owner can-

not reclaim it without reimbursing to the purchaser the price paid by him.¹

FOLGER, C. J. This is an action for the conversion of chattels. It is clear that if the plaintiff had the title to them, or the right to take immediate possession of them, the defendant exerted such dominion over them as was in law a conversion of them. It is also clear that the plaintiff had the title to the property by the laws of this State, and the right to the immediate possession of it.

The defendant must make his defence, if he may at all, upon a title got by Bromley from De Lisle, to which he has succeeded. De Lisle was a resident of Canada, and a trader dealing in articles like the property in contest, and had actual possession of this property there as the proprietor of it. Bromley bought it of him in good faith, gave value for it, and had not actual notice of the plaintiff's right to it. The plaintiff has never reimbursed to Bromley or to the defendant the price paid for it by Bromley, nor has he offered so to do.

We think that these facts make a title in Bromley that the law of Lower Canada would uphold in that jurisdiction. We deem it unnecessary to go into the detail of the interpretation. The question remaining is, which law is to prevail in determining this contest — that of Lower Canada, or that of this State?

We take note that the plaintiff, and Baker from whom the plaintiff got title, were residents of this State when the transfer was made between them; that it was a transfer of property which was then here, whence it was taken without the consent of the plaintiff; that the transfer was made by mutual consent, and was executed and valid here; that the consideration for the transfer existed and passed here; that the plaintiff and defendant were and are residents of this State; and that the forum in which they stand is here. Thus the law of the domicile, and the law of the then situs of the property, and the law of the forum in which the remedy is sought, all concur to sustain the right of the plaintiff. The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him. By that law, as it exists in this case, the plaintiff became the owner of this property before it was taken beyond its operation. By that law, too, an owner of property may not be divested of it without his consent, or by due process of law; plainly not by a dealing with it by others without his knowledge, assent, or procurement. Still, another State may make provision by statute in respect to personal property actually within its jurisdiction. Though a transfer of personal property, valid by the law of the domicile, is valid everywhere as a general principle, there is to be excepted that territory in which it is situated and where a different law has been set up, when it is necessary for the purpose of justice that the actual situs of the thing be examined. *Green v. Van Buskirk*, 7 Wall. 139. Yet the statutes of that land have no extraterritorial force *proprio vigore*, though often permitted

¹ Arguments of counsel are omitted. — Ed.

by comity to operate in another State for the promotion of justice, where neither the State nor its citizens will suffer any inconvenience from the application of them. The exercise of comity in admitting or restraining the application of the laws of another country must rest in sound judicial discretion, dictated by the circumstances of the case. Per Parker, Ch. J., *Blanchard v. Russell*, 13 Mass. 6. It is plain that on no principle applicable to this case could the sale of the plaintiff's property by another having no authority from him, to his wrong indeed, be upheld, save that it was authorized by the statute of Lower Canada. So that the question is one entirely of the comity to be shown by the courts of this State to the enactments of another country. Those statutes not only enact the rule of market-overt as it prevails in general in England, but carry it further, and make, as in the city of London, every sale by a trader dealing in like articles as good as a sale at market-overt.

That rule does not obtain in this State. It has not been our policy to establish it. Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title. It would be to the contravention of that policy, and to the inconvenience of our citizens, if we should give effect to the statutes of Lower Canada, to the divesting of titles to movables lawfully acquired and held by our general and statute law, without the assent or intervention, and against the will of the owner by our law. Notions of property are slight, when a *bona fide* purchase of stolen goods gives a good title against the original owner. Per Kent, Ch. J., *Wheelwright v. Depeyster*, 1 Johns. 470. We are not required to show comity to that extent, especially as it is to our citizens alone that we are administering justice.

There are judgments to the end that the law of the situs of the movable property will determine who is entitled to it, and the matter of comity is not taken into account. A notable one is *Cammell v. Sewell*, in the Exchequer Chamber, 5 H. & N. 728. But there the property had not been in England until after the sale in Norway, and had never been in the possession of the English owners. We doubt whether, in a case like this, where, after a title to property has been acquired by the law of the domicile of the vendor, and of the situs of the thing, and of the forum in which the parties stand, in a contest between citizens of the State of that forum, it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another State, and a sale of it there under different laws. There are decisions that it has not, however. See *Taylor v. Boardman*, 25 Vt. 581; *Martin v. Hill*, 12 Barb. 631; *French v. Hall*, 9 N. H. 137; *Langworthy v. Little*, 12 Cush. 109. It is sought to distinguish these cases from that in hand; but they went upon a principle that is not inapplicable here. In them, as here, a right to movable property had been acquired in one State in a mode efficient thereto by its laws. The property had been taken into another State where that mode was not sufficient by its law to create a right. But the right acquired by that

mode was upheld. In all the cases the property was taken away from under the laws which gave the right, and placed under the operation of laws that denied the right. We perceive no difference in those cases from this that we have, save that in those a creditor was seeking to recover his debt out of the property, *in invitum* the right thus acquired. Here there is a sale of the property between third parties despite the right. In those it was sought to take away the right by a public judicial sale. In this it is urged that the right has been destroyed by a private sale. By the laws of those other States the creditors would have succeeded. So here the third parties would succeed by the law of Lower Canada. But in those cases the law of the State where the right was acquired was recognized, and force given to it in another State, and under different law. Why should it not be in this case?

Such cases as *Cranch v. McLachlin*, 4 Johns. 34, and *The Helena*, 4 Rob. Ad. 3, do not conflict. In them there were in the foreign country legal proceedings *in rem*, or analogous thereto, so that the question was of respect for the judicial proceedings of another country. The case of *Greenwood v. Curtis*, 6 Mass. 358, recognized the principles upon which our judgment proceeds, but held that the facts did not call for the application of them.

The order of the General Term should be reversed, and judgment on report of the referee be affirmed.

All concur, except RAPALLO, J., not voting.

*Order reversed and judgment affirmed.*¹

DAMMERT v. OSBORN.

COURT OF APPEALS, NEW YORK. 1893.

[*Reported 140 New York, 30.*]

O'BRIEN, J.² José Sevilla, residing and domiciled at Lima, in the republic of Peru, died there on the 9th of December, 1886, having made and published his last will and testament, bearing date July 2, 1885, by which he disposed of a large estate, consisting mostly of personal property, a considerable portion of which, or the evidences thereof, was at the time of his death actually within this State. The will was duly proved and established under the usual and proper judicial proceedings in the courts of the country where the testator was domiciled, having by law jurisdiction in such cases, and executors appointed pursuant to its provisions. These executors, residing in Peru, together with the appointed heirs and residuary legatees, caused the will or a copy thereof to be recorded in the office of the surrogate

¹ Followed, *Wylie v. Speyer*, 62 How. Pr. 107. And see *Todd v. Armour*, 19 Scot. L. R. 656. — Ed.

² Part of the opinion only is given. — Ed.

of New York, and thereupon, with their assent and upon their motion, the plaintiffs were appointed ancillary executors in this State, and having qualified and entered upon the duties of the trust, took into their possession the personal estate here. The single provision of the will out of which the questions arise which are involved in this appeal, is a charitable bequest for the education of poor female children in the city of New York.

The several clauses by means of which the testator sought to accomplish this purpose are quite elaborate and formal, and their substance and effect will be sufficient to give a clear view of the general purpose, as well as the mode in which it was to be executed. The testator states in the will that in the previous year, 1884, he executed a will by which he left the larger part of his fortune to found an institution in New York under the name of "The Sevilla Home for Children," and in which he formulated the details of support and management, but in view of the unfortunate situation of his relatives and various persons dear to him, he deemed it necessary to reconcile this desire with his duties to his family. He then proceeds to declare that it is his will that there be established in the city of New York, and permanently maintained, an institution to be known as the "Sevilla Home for Children," to be managed by his executors and a board of philanthropic managers, and devoted to the education of poor female children.

He directed that in all matters relating to the institution a prudent economy be observed; that the buildings be adequate to the end to be attained, constructed to receive from fifty to one hundred children and the teachers required, the land to be purchased and buildings erected at moderate prices. The managers were empowered to make rules for the government of the institution in the best manner, not forgetting the following conditions: (1) Only very poor children, from five to ten years of age, fit for apprenticeship and free from ailments, were to be admitted, to remain in the home until they attained the age of sixteen. (2) The food and clothing to be economical and suitable, and the latter to be of uniform pattern and color for all. (3) The instruction to be primary and upon the basis of a moral education with directions as to the practical branches to be taught. (4) Day scholars to be admitted providing they did not occasion expense, to be kept apart from the boarders in order to preserve the moral tone. He then gives directions for investing any money earned by the children, whenever that was possible, one-half to be paid to them at sixteen, and the other half devoted to the support of the school. The number of children to be always subordinate to the resources, preference to be given to natives of Peru, upon the recommendation of Peruvian consuls at New York or the place where application was made. The fitness of the children being proved, the managers could not, within the limit as to numbers, refuse them admission for any motive whatever. The board of philanthropic managers to be composed of seven prominent citizens of the city of New York, to be selected by the surrogate from a list

which the testator named. For the purpose of founding and endowing the institution, five hundred thousand dollars was bequeathed in the securities, constituting his estate, at par, to be delivered to the board by the executors. The board was directed to postpone the purchase of land and construction of buildings for two years after delivery of the securities, in order that the school should be founded with the accumulated interest in that period, without reducing the principal sum for that purpose. The executors and appointed heirs were directed to transmit to the municipality of New York, a copy of the clauses of the will relating to the institution, and the testator requested the municipal authorities to watch over and care for the fulfilment and performance of the will in this regard. The trustees were appointed in conformity with the terms of the will and accepted the trust and have been made defendants in this action. The plaintiffs, as ancillary executors, have possession of the securities devoted by the will to the founding of the home and hold the fund bequeathed, subject to the order and direction of the court. The trustees, or philanthropic managers, as they are designated by the will, applied to the legislature of this State for incorporation, and upon this application chapter 17 of the Laws of 1889 was enacted, by which they and such other persons as they might associate with themselves, in accordance with the provisions of the will, were created with a body corporate and politic under the name and title of the "Sevilla Home for Children." The incorporators were by name declared to be the permanent trustees of the corporation in accordance with the will of the testator, and in case of a vacancy by death, resignation, or otherwise, the survivors were empowered to fill it in accordance with the directions of the will, as near as may be, so that the number should be kept at seven. The trustees were given full power to control and manage the corporation, and for that purpose to make by-laws and appoint such agents and officers as might be deemed necessary, and to fix their tenure of office as well as their own. The corporation was declared to possess all the powers and, except as otherwise provided by the act, to be subject to the provisions of the Revised Statutes. It was expressly empowered and directed to accept and receive the gift bequeathed by the will, upon the terms and conditions there expressed, and power was conferred upon it to enter into any obligation in order to secure compliance with such terms and conditions. In addition to the powers conferred by law upon corporations, it was declared that this corporation should have power and capacity to establish and maintain a home for the education of poor children in the city of New York as provided in the will, and for that purpose to demand and receive the fund bequeathed by the will for that purpose, and to hold, manage, and dispose of the same in such manner as might be best calculated to carry out the objects and purposes indicated by the testator. The trustees accepted the trust under the act of incorporation and organized under it. The will contains various other large bequests to relatives and friends and for charitable

purposes, the validity of which are not involved in this action, and, so far as appears, they are not questioned by any one. In the thirty-sixth clause, the persons are designated by the testator who were empowered to administer the estate and carry out the will, and, in what seems to be the language of Peruvian law, they are called executors and appointed or testamentary heirs, and they were, by the terms of the will, to co-operate with the trustees in founding the institution and administering the gift.

The plaintiffs, in their complaint, state all the facts and ask for the judgment of the court with reference to the disposition of the fund in their hands. The defendants are the trustees named in the will and the corporate body created upon their application and the executors, appointed heirs, and residuary legatees named by the testator. It appears that they were all served, but none of them answered or made any claim to the fund except the corporation known as the Sevilla Home for Children, the trustees and the Sociedad de Beneficiencia de Lima, one of the residuary legatees. The latter is the only party to the action who really disputes the right of the corporation or the trustees to the fund. The will directed that said Sociedad should receive the various legacies of public interest, and should deliver them over to the respective institutions in the will named, and that if any such institutions should decline to receive the same, the legacy to it should pass to said Sociedad.

The learned judge, before whom the cause was tried at the Special Term, held that the bequest for the Sevilla home was void, as contravening the statute of this State against perpetuities and for other reasons, and that none of the defendants were entitled to receive the gift, and he directed that the plaintiffs account for the fund to the executors and appointed heirs in Peru, and to that end that the fund be remitted to that country without determining to whom the beneficial interest in the fund belonged. The General Term has affirmed the judgment, and the Sevilla Home and its individual trustees have appealed to this court.

At every stage of the inquiry pressed upon us by this appeal, it is important to keep in view a fundamental fact, established by uncontradicted evidence at the trial and conceded upon the argument, and that is that the bequest to the Sevilla Home was perfectly valid by the law of Peru, the domicile of the testator, which governed his personal property, wherever it was at the time of his death. The validity of the gift by the law of the domicile necessarily involves the conclusion that it is not affected, under that law, by the fact that at the time of the testator's death there was no trustee competent to take, or that the estate did not vest within a period measured by lives, or by the general and indefinite nature of the trust, nor any other local rule that would defeat the intention of the testator in case it had been a domestic will. The general principle that a disposition of personal property, valid at the domicile of the owner, is valid everywhere is of universal application.

It had its origin in that international comity which was one of the first fruits of civilization, and in this age, when business intercourse and the process of accumulating property take but little notice of boundary lines, the practical wisdom and justice of the rule is more apparent than ever. It would be contrary to the principles of common justice and right upon which the rule is founded, to permit a testamentary disposition of personal property, valid by the law of the domicile, to be annulled or questioned in every other country where jurisdiction was obtained over the property disposed of or the parties claiming it, except for the gravest reasons. There are, no doubt, some exceptions to the rule founded upon considerations of public policy and necessity. Foreign contracts or dispositions of property which, if carried out, would endanger the public morals or the public safety, or undermine the political or social fabric, or subvert the administration of justice, or had other evil tendencies, are not within the rule, as the right and duty of self-preservation is higher and stronger in every community than any obligation founded in comity.

But the object of this bequest, instead of tending to such results, was highly laudable and commendable, and certainly there is no public policy that forbids its execution. The law allows and in every proper way encourages such gifts, and sustains them, when capable of execution, and even when they are not, it does not hold them void, if valid under the law of the domicile, and it is only in cases where there is no adequate legal regulation for administering or carrying them into effect, that the property will be remitted to the government of the domicile for administration. None of the parties in this case have acquired any title to the fund in question that they are not given by the law of Peru. Our courts may in certain cases decline to administer the gift, and remit the property to the principal seat of administration, but they cannot divest the title of one or transfer it to another contrary to the law of the domicile. That law is part of the disposition and the foundation of all title under it, and it cannot be disregarded to the prejudice of one and the benefit of another any more than the other parts of the instrument. There is no law that forbids gifts to charity here by testators in other countries, or that requires us to reject the gift unless it is made, in all respects, in conformity with our local law. There is no public policy on that subject except what is to be found in the language of the statute, and that provides that "the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator." 2 R. S. 6th ed. p. 1167.

When that statute was passed it was not within the legislative purpose to interdict dispositions made in other countries to take effect here. There is nothing in the language used that indicates such a pur-

pose. There are other statutes that invalidate testamentary gifts to certain corporations unless made within a certain time before death where the testator had wife, children, or parents. The purpose of these statutes is evident. They were intended to prevent improvident and hasty bequests to the prejudice or neglect of those natural obligations which the law also imposes upon the citizen. But these restraints applied to members of the political community from which the law emanated and not to persons in other countries where no such restrictions existed, and who desired to give according to their own laws. Bequests by such persons to those corporations, without regarding the statutes referred to, would be good if valid at the domicile of the testator. *Hollis v. Drew Theo. Seminary*, 95 N. Y. 171. It is no part of our public policy to condemn such gifts to charitable or benevolent corporations here. Our law permits the citizens or subjects of other countries to dispense charity here in such measure as they wish and according to such methods as their own laws prescribe. The policy that dictated our statutes against perpetuities and accumulations did not anticipate any danger from abroad, and our recent decisions are to the effect that they are local in their general scope and effect. *Cross v. U. S. Trust Co.*, 131 N. Y. 330; *Hope v. Brewer*, 136 N. Y. 126.

In the first case cited we held that a testamentary disposition of personal property in trust, by a person domiciled in another State, valid by the law of the domicile, though in some respects contrary to our statute, was not void, and we refused to annul the will of the testator that had taken effect and been acted upon here for many years. In the second case we refused to interfere with a testamentary disposition in a domestic will, containing a trust for a charity in a foreign country, where it was valid and capable of being executed and enforced, although perhaps under our law the beneficiaries were not sufficiently defined and it may have been open to other objections. The trend of these cases is unquestionably towards the conclusion that our statutes apply to domestic wills that by their provisions are to be executed here. An accumulation to take effect in another country or a bequest made there to take effect here was not within the intention of the legislature when these statutes were framed. There is, however, this clear distinction between the cases cited and the one at bar. In the former we were not asked to aid in any way the execution of the will or the administration of the trust, but to declare it void at the suit of heirs or next of kin. The parties who stood upon the dispositions of the will simply asked us to allow them to execute the testator's purpose with respect to his property and to manage their own business in their own way. But in this case we are asked, virtually, to put the Sevilla Home in possession and control of the fund and thus give active aid and assistance in the enforcement of a trust, which, in a domestic will, would doubtless be void, and therein is the real difficulty which the situation presents. The objection to this relief, which, under ordinary circum-

stances, might be formidable, has been, we think, greatly obviated, if not entirely removed, by the legislation which has been enacted since the death of the testator. That has a much broader scope and operation than the mere creation of a corporate body. It is an expression of the will of the supreme legislative power that the gift in question should be received and administered in the manner and for the objects designated in the will, as near as may be, and thus every existing legal obstacle to the execution of the testator's purpose must be deemed to have been suspended or *pro tanto* repealed. The legislature in effect said that, notwithstanding the indefinite nature of the trust, if it was indefinite, or the circumstance that the testator did not appoint a trustee competent to take, or that the absolute ownership was suspended for a period not measured by lives, this gift shall take effect, according to the intention of the donor, and be administered by a corporate body of its own creation. The legislature had the power to so enact unless, in the meantime, the title or beneficial interest had vested in heirs, next of kin or legatees, and, as under the law of the domicile, it did not, the power of the legislature to accept a gift that was awaiting a competent trustee to administer it, cannot well be doubted. It is not important to ascertain or decide where the title to the fund was lodged in the meantime. It was wherever the law of Peru placed it. Whether in the executors, for the purpose of delivering it to the trustees, or in abeyance, it matters not. So long as that law would not permit it to vest in any other person, or for any other purpose, no property right was violated by the legislation. Had the title vested elsewhere, in the meantime, in consequence of the invalidity of the bequest, or for any reason, of course that title could not be disturbed by the legislature. But by force of the law of the domicile upon the facts disclosed by the record, if the fund should be remitted to the executors in Peru, pursuant to the judgment, they would, in the discharge of the trust imposed upon them by the testator, be bound to pay it over to the Sevilla Home for the purpose declared in the will, as the legislature had, subsequent to the death of their testator, created a competent body to execute that purpose without affecting any private right. The necessity or expense of such circumlocution is not perceived. Generally whatever the law will permit to be done indirectly may be done directly.

There is another and more recent statute that has some application to this case, as it is the last expression of the legislative will on the subject, and discloses what our public policy is with regard to such bequests. By chapter 701 of the Laws of 1893, entitled "An act to regulate gifts for charitable purposes," it is enacted that no such gift, when valid in other respects under the law of this State, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries in the instrument creating the same. That in such cases when a trustee is named the title shall vest in him, and if no person is named as trustee, then the title shall vest

in the Supreme Court, and in all cases of bequests to charitable uses, where the beneficiaries are not definitely designated, that court shall have full control, and it shall be the duty of the attorney-general to enforce the trust and represent the beneficiaries. This statute indicates an intention on the part of the legislature to enforce and uphold charitable bequests not heretofore recognized as valid, and it may be regarded as the first step in the direction of modifying that body of law which this court has built up on the ruins of the system outlined in *Williams v. Williams*, 8 N. Y. 525.

The result which the second division of this court was constrained to reach in a recent case of public importance, no doubt had some influence in creating the sentiment which is embodied in the law. *Tilden v. Green*, 130 N. Y. 29.

It seems to be assumed, on the part of the respondents, that these statutes can have no application to this case, inasmuch as they were not enacted until after the testator's death. That would be so had the property vested otherwise than for the purpose of founding the home; but as it did not under the law of the domicile it could not under the law of the forum. When a court of equity obtains jurisdiction and all the facts are before it by supplemental pleading, as they are here, it may and generally does adapt the relief to the situation existing at the close of the litigation. *Peck v. Goodberlett*, 109 N. Y. 181; *Mad. Ave. Bap. Ch. v. Oliver St. Bap. Ch.*, 73 N. Y. 83.

The case turned in the court below upon the views of public policy with respect to the enforcement of the donor's will, but what that policy actually is should be determined by the situation existing at the time the court is required to make its decree disposing of the fund, and the statutes referred to have an important bearing upon that question. . . .

The judgment should be reversed, and final judgment directed in favor of the Sevilla Home for Children, with costs to all parties, as awarded by the courts below, and to the plaintiffs in this court, payable out of the fund.

All concur.

*Judgment accordingly.*¹

¹ *Acc. Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636; *Crum v. Bliss*, 47 Conn. 592; *Fellows v. Miner*, 119 Mass. 541; *Healey v. Reed*, 153 Mass. 197, 26 N. E. 404. — ED.

CHAPTER XIII.

INHERITANCE.

CAMPBELL v. TOUSEY.

SUPREME COURT, NEW YORK. 1827.

[Reported 7 Cowen, 64.]

ASSUMPSIT for money lent to the testator of the defendant. Pleas: (1) *Non assumpsit*; (2) *Ne unques executor*; (5) *No assets*. The plaintiff on the trial proved his claim to \$94.42, and that the defendant's testator resided and died in Pennsylvania in 1823. He also proved assets to about \$700, which the defendant had received in Pennsylvania and brought from that State to this; and that he had received a certain amount in this State. The defendant proved that he was appointed executor by the will of Booth, and had taken out letters testamentary in Pennsylvania. The judge charged the jury that the defendant was liable as executor for all the assets he still retained in his hands, or had expended or disposed of here, unless in the due course of administration, whether they were received here or brought from Pennsylvania. That his appointment as executor in that State would not, *per se*, protect him; but he must show also that the assets received by him there and here had been disposed of under that appointment, or in the payment of Booth's debts in this State. Having failed to do either, he was liable as executor, *de son tort*, to the amount of the plaintiff's claim, if the assets in his hands amounted to so much. Verdict for the plaintiff for \$94.42.¹

SUTHERLAND, J. The testator resided and died in Pennsylvania, and there the will was proved. The defendant received assets of the estate in Pennsylvania, and brought them with him into this State. He also in this State received debts due to the testator to a considerable amount. The judge charged the jury that the defendant was liable for all the assets which he still retained in his hands, or which he had expended or disposed of in this State, unless in the due course of administration, whether they were received in this State or originally received in Pennsylvania and brought from there here. That the fact

¹ The statement of facts is slightly condensed. Arguments of counsel and part of the opinion are omitted. — ED.

of his having been appointed executor in Pennsylvania would not of itself protect him here; but that it was incumbent on him to show that the assets which he had received in Pennsylvania and brought into this State, as well as those which he had received here, had been disposed of in a due course of administration in Pennsylvania, or in the payment of the debts of the testator in this State. That having failed to do either, he was liable as executor *de son tort* to the amount of those assets.

We see no error in this charge of the judge. If a foreign executor is liable to be sued here, of which we apprehend there can be no question, he must, from the very nature of the case, *prima facie*, be responsible for the assets which are shown to have been in his possession within this State, no matter where they may have been received. And in order to discharge himself from that responsibility, he must show that those assets have been applied in a due course of administration to the payment of the debts of the testator. It is the only way in which an executor, under such circumstances, can be reached. He cannot be compelled to account here, even in relation to the assets received in this State; for having taken no letters of administration here, he is not amenable in that way to any of our courts. He cannot be reached in Pennsylvania, because both his person and the assets are beyond its jurisdiction; and if he is not liable when sued here for the assets received there, he never can be compelled to apply them to the debts of his testator. . . .

The defendant was clearly an executor *de son tort*, and the action was properly brought against him as executor generally. Com. Dig. Administrator, C. 1, 2, 3; Toller's Ex., 17, 369.

It is well settled that if an executor *de son tort* plead *ne unques executor*, as was done in this case, and it be found against him, he shall be charged as any other executor, *de bonis propriis*. Toller, 369.

The motion for a new trial must be denied.

*New trial denied.*¹

JUDY v. KELLEY.

SUPREME COURT, ILLINOIS. 1849.

[Reported 11 Illinois, 211.]

TREAT, C. J.² This is an action of debt, on a judgment recovered in the State of Ohio by Kelley, against the administrators of William Allington. It appears from the record of the proceedings in Ohio that

¹ Statute having done away with executors *de son tort*, it was held that a foreign executor found in New York with assets could not be sued. *Field v. Gibson*, 20 Huu, 274. — ED.

² Part of the opinion, discussing other questions, is omitted. — ED.

the suit was there brought against Allington in his lifetime, and service of process had on him. At a succeeding term, the plaintiff suggested the death of Allington, and obtained leave to revive the suit, against his personal representatives. At a subsequent term, the present plaintiffs in error entered their appearance, and pleaded to the action as administrators of Allington; and a trial of the cause resulted in the judgment now the subject of controversy. The presumption from that record is, that the plaintiffs in error obtained letters of administration on the estate of Allington in Ohio. To repel this presumption, the second plea alleges that they were appointed administrators in this State, and that administration was never granted them elsewhere. This presents the question whether a judgment recovered in another State against an administrator appointed in this State can be here enforced against the estate. A grant of administration in one country does not confer on an administrator any title to the property of the intestate situated in another country. He has no authority over, nor is he responsible for any effects of, the estate that may be beyond the jurisdiction. In administering the estate, he acts only in reference to the effects within the jurisdiction, and the debts that may there be presented against the estate. In his official capacity, he can neither sue nor be sued out of the country from which he derives his authority, and to which he is alone amenable. If he wishes to reach property, or collect debts belonging to the estate in a foreign country, he must there obtain letters of administration, and give such security and become subject to such regulations as its laws may prescribe. So, if a creditor wishes to bring a suit in order to satisfy his debt out of property in another jurisdiction, administration must there be first obtained. See Story's Conflict of Laws, § 513, and the numerous authorities there cited. There are a few cases in this country to the effect that a foreign executor may be sued in another jurisdiction, and be there made liable to the extent of the assets he may have with him; but the cases go no farther than to sustain the action for the purpose of subjecting such assets to the payment of the particular debt. *Campbell v. Tousey*, 7 Cow. 64; *Swearingen's Ex'rs v. Pendleton's Ex'rs*, 4 Serg. & R. 389; *Evans v. Tatem*, 9 Serg. & R. 252; *Bryan v. McGee*, 2 Wash. C. C. R. 337. It may be doubted whether these decisions can be supported on principle or authority; but conceding their correctness, they have no direct bearing on this case. The attempt here is to enforce against an estate a judgment rendered in Ohio against administrators appointed in this State. It is clear that the State of Ohio could not rightfully extend her jurisdiction over the plaintiffs in error, in their official character, while within her limits, further than to compel them to account for such assets as they might there have. The plaintiffs in error derived their authority from this State, and they are to be made responsible here only for their acts. That State may grant letters of administration on the estate, and in that way have the effects found within her territory administered; but she cannot, by proceed-

ings in her own courts, reach the assets in this State, or establish claims against the estate that will here be enforced. The debts against the estate are to be adjusted, and the effects belonging to it distributed, according to our own laws.

But it is insisted that the plaintiffs in error, by entering their appearance to the action in Ohio, submitted themselves to the jurisdiction of the court, and cannot now question its authority to pronounce the judgment. This position would be correct if the proceedings there had been against them personally; but as respects them in their representative capacity, we think the effect is otherwise. The grant of administration in this State gave them no control over the estate in Ohio. It did not confer on them any authority to appear and defend the action; any power to go into another jurisdiction, and there permit claims to be adjudicated against the estate. Their authority is limited, and when they exceed it their acts will not bind the estate. The appearance being wholly unauthorized by our laws, the judgment that resulted from it is not binding on the estate. If binding here, for any purpose, it is against the plaintiffs in error personally. If the judgment had been obtained against an administrator duly appointed in Ohio, the record would not be evidence of indebtedness, in an action against the administrators, in this State. "Where administrations are granted to different persons in different States, they are so far regarded as independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter, in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator." Story's Conflict of Laws, § 522.

We are of the opinion that the judgment, if the allegations of the plea are true, cannot be here enforced against the estate. The demand against the intestate has not been adjusted in pursuance of our laws, but in defiance of them. If the creditor wishes to secure any share of the assets in this State, he must sue on his original cause of action. This conclusion is not in conflict with the case of *Davis v. Connelly's Ex'rs*, 4 B. Mon. 136. That was an action brought in Kentucky against executors appointed in that State, on a judgment obtained against them in Ohio. The executors pleaded that they had never administered in Ohio; and the plaintiff replied that the defendants, acting as executors and professing to be such, entered their appearance in the original action, and thereby became executors *de son tort*, and are estopped to deny that they were executors in Ohio. The court sustained the replication, and decided that the defendants were chargeable as executors in their own wrong. In this case the plaintiffs in error are not sued as executors *de son tort*; but the object of the suit is to enforce the judgment against the estate, and satisfy it out of the assets. . . .

*Judgment reversed.*¹

¹ In most jurisdictions it is held that a foreign executor or administrator cannot be sued as such under any circumstances, even if he resides in the State or is found there

JOHNSON v. WALLIS.

COURT OF APPEALS, NEW YORK. 1889.

[Reported 112 *New York*, 230.]

FINCH, J.¹ This is an action in equity to compel the specific performance by the vendors of a contract to sell and assign a judgment recovered by John McAnerney and others, in the Supreme Court of this State, against a corporation known as the Hudson River Iron Company. The judgment was assigned to one Alexander H. Wallis, who was a resident of New Jersey, and died leaving a last will and testament, which has been duly proved in that State, and by which the defendants were appointed executors. They have qualified, and entered upon the performance of their trust. They thereafter made a written contract with one Jacob Russell, all whose rights have passed to the present plaintiff, to sell and assign to him such judgment for a price to be fixed as follows. The judgment was a lien, or supposed to be a lien, upon certain lands under the waters of the Hudson River, near Poughkeepsie, in this State, and had no value beyond

with assets. *Caldwell v. Harding*, 5 Blatch. 501; *Security Ins. Co. v. Taylor*, 2 Biss. 446; *Mellus v. Thompson*, 1 Cliff. 125; *Hedenberg v. Hedenberg*, 46 Conn. 30; *Johnson v. Johnson*, 34 Ga. 511; *Strauss v. Phillips*, 189 Ill. 1, 59 N. E. 560; *Mason v. Nutt*, 19 La. Ann. 41; *Campbell v. Sheldon*, 13 Pick. 8; *Boyd v. Lambeth*, 24 Miss. 433; *Durie v. Blauvelt*, 49 N. J. L. 114; *Ferguson v. Harrison*, 29 N. Y. Misc. 380, 58 N. Y. Supp. 850; *Sparks v. White*, 7 Humph. 86; *Dorsay v. Connell*, 22 N. B. 564. And this is true, even though by statute a foreign representative may sue. *Fairchild v. Hagel*, 54 Ark. 61; *Sloan v. Sloan*, 21 Fla. 589. And even though the administrator consents to be sued in the foreign State. *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095; *Flandrow v. Hammond*, 13 App. Div. 325, 43 N. Y. Supp. 143. It is therefore no *devastavit* for an administrator, when sued in a foreign State, to suffer default. *Davis v. Smith*, 5 Ga. 274.

In a few States, however, a foreign representative may under some circumstances be sued as such. Thus it is sometimes held that an administrator who has come to reside within a foreign State may be sued there. *Colbert v. Daniel*, 32 Ala. 314; *Manion v. Titsworth*, 18 B. Mon. 582; *Baker v. Smith*, 3 Met. (Ky.) 264. In other States it is held that if an administrator is found in a foreign State having assets, he may be sued there. *Laughlin v. Solomon*, 180 Pa. 181, 36 Atl. 704; *Tunstall v. Pollard*, 11 Leigh, 1; *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063. And a few cases appear to hold that suit may be brought against any foreign administrator upon whom process may be served. *Evans v. Tatem*, 9 S. & R. 252; *Armstrong v. Newey*, 17 Vict. L. R. 734. It is sometimes held that suit may be brought against a foreign representative if all parties in interest consent. *Newark Sav. Inst. v. Jones*, 35 N. J. Eq. 406; *Ellis v. Northwestern Mut. L. Ins. Co.*, 100 Tenn. 177, 43 S. W. 766.

Where a foreign executor or administrator holds adversely within the State assets of the estate, he may be made to account in equity as constructive trustee. *Clopton v. Booker*, 27 Ark. 482; *Johnson v. Jackson*, 56 Ga. 326; *Patton v. Overton*, 8 Humph. 92. — Ed.

¹ Part of the opinion, discussing the correctness of the arbitrators' valuation, is omitted. — Ed.

such lien. Arbitrators were chosen to fix the value of one acre of the upland, and that value, multiplied by the number of acres subject to the lien, was to be the purchase-price of the judgment. That value was ascertained, the price tendered, and a deed duly demanded, which was refused, and thereupon this action was brought. The plaintiff had judgment which the General Term affirmed, and the defendants appealed to this court.

They rely mainly upon the proposition that as foreign executors they could not sue or be sued in this State, and acquire all their rights from and owe their responsibilities to another jurisdiction. That is the general rule, but in this State at least is confined to claims and liabilities resting wholly upon the representative character. In *Lawrence v. Lawrence* (3 Barb. Ch. 74), the rule was declared to be applicable only to suits brought upon debts due to the testator in his lifetime or based upon some transaction with him, and does not prevent a foreign executor from suing in our courts upon a contract made with him as such executor. Of course where he can sue upon such a contract he may be sued upon it. The remedy must run to each party or neither. In the present case the action is not founded upon any transaction with the deceased but upon a contract which the defendants themselves made. By force of the will and their appointment they became owners of the judgment. Their title, although acquired under the foreign law, was good. In *Peterson v. Chemical Bank* (32 N. Y. 21) the foreign executor sold an obligation of the estate and his assignee sued upon it. The action was sustained on the ground that the title of the foreign executor was good and he could transfer it, and while he could not have sued upon it his assignee was not prevented. In this case, therefore, the defendants were owners of the judgment and could lawfully contract for its sale. Having done so they were liable upon that contract, which could be enforced against them because they made it, and it did not derive its existence from any act or dealing of their testator. We agree, therefore, with the courts below that the action could be maintained. . . .

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

TALMAGE v. CHAPEL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1819.

[Reported 16 *Massachusetts*, 71.]

THE plaintiff declares as administrator of the estate of George Clinton, in debt upon a judgment recovered by him in his said capacity

¹ But see *Marrett v. Babb* (Ky.), 15 S. W. 4, where it was held that a foreign executor could not enforce specific performance of a contract made by him on behalf of the estate.

against the defendants, in the Court of Common Pleas for the county of Oneida, in the State of New York.

The defendants plead in bar, that the parties, at the time of rendering the said judgment, were all inhabitants of the State of New York, and that the plaintiff was appointed administrator in that State, and has not been so appointed within this commonwealth. To which the plaintiff demurred, and the defendants joined in demurrer.¹

CURIA. We think the plea in bar bad. The case of *Goodwin v. Jones* (5 Mass. 514), cited by the counsel for the defendants, does not apply. The action there was brought for money due to the intestate on a contract made with him; here the action is on a judgment already recovered by the plaintiff, and it might have been brought by him in his own name, and not as administrator. For the debt was due to him, he being answerable for it to the estate of the intestate; and it ought to be considered as so brought, his style of administrator being merely descriptive, and not being essential to his right to recover. It is important to the purposes of justice that it should be so; for an administrator appointed here could not maintain an action upon this judgment, not being privy to it. Nor could he maintain an action on the original contract; for the defendants might plead in bar the judgment recovered against them in New York. The debt sued for is in truth due to the plaintiff in his personal capacity. For he makes himself accountable for it by bringing his action; and he may well declare that the debt is due to himself. There are many cases which show that, where the debt becomes due after the death of the intestate, the administrator may sue for it in his own name; some of which have been cited by the plaintiff's counsel.

*Defendants' plea bad.*²

JOHNSON v. POWERS.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 139 *United States*, 156.]

GRAY, J. This is a bill in equity, filed in the Circuit Court of the United States for the Northern District of New York, by George K.

¹ Arguments of counsel are omitted. — Ed.

² *Acc. In re Macnichol*, L. R. 19 Eq. 81; *Newberry v. Robinson*, 36 Fed. 841; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833; *Barton v. Higgins*, 41 Md. 539; *Rucks v. Taylor*, 49 Miss. 552 (*semble*); *Tittman v. Thornton*, 107 Mo. 500, 17 S. W. 979. *Contra* *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125.

So an administrator *de bonis non* may sue his predecessor in a foreign State for the balance found by his own court to be due from him. *Moore v. Fields*, 42 Pa. 467.

Similarly, where an administrator is sued and gets judgment against the plaintiff for costs, he may sue upon the judgment in another State. *Green v. Heritage*, 63 N. J. L. 455, 43 Atl. 698. — Ed.

Johnson, a citizen of Michigan, in behalf of himself and of all other persons interested in the administration of the assets of Nelson P. Stewart, late of Detroit in the county of Wayne and State of Michigan, against several persons, citizens of New York, alleged to hold real estate in New York under conveyances made by Stewart in fraud of his creditors.

The bill is founded upon the jurisdiction in equity of the Circuit Court of the United States, independent of statutes or practice in any State, to administer, as between citizens of different States, any deceased person's assets within its jurisdiction. *Payne v. Hook*, 7 Wall. 425; *Kennedy v. Creswell*, 101 U. S. 641.

At the threshold of the case, we are met by the question whether the plaintiff shows such an interest in Stewart's estate as to be entitled to invoke the exercise of this jurisdiction.

He seeks to maintain his bill, both as administrator and as a creditor, in behalf of himself and all other creditors of Stewart.

The only evidence that he was either administrator or creditor is a duly certified copy of a record of the probate court of the county of Wayne and State of Michigan, showing his appointment by that court as administrator of Stewart's estate; the subsequent appointment by that court, pursuant to the statutes of Michigan, of commissioners to receive, examine, and adjust all claims of creditors against the estate, and the report of those commissioners, allowing several claims, including one to this plaintiff, "George K. Johnson, for judgments against claimant in Wayne Circuit Court as endorser," and naming him as administrator as the party objecting to the allowance of all the claims.

The plaintiff certainly cannot maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect; because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that State, and cannot authorize him to maintain any suit in the courts, either State or national, held in any other State. *Stacy v. Thrasher*, 6 How. 44, 58; *Noonan v. Bradley*, 9 Wall. 394.¹

¹ The foreign representative of a deceased creditor (whether executor or administrator) cannot sue on the claim of the deceased. *Tourton v. Flower*, 3 P. Wms. 369; *Allen v. Fairbanks*, 36 Fed. 402; *Lewis v. Adams* (Cal.), 8 Pac. 619; *Hobart v. Turnpike Co.*, 15 Conn. 145; *Naylor v. Moody*, 2 Blackf. 247; *Gregory v. McCormick*, 120 Mo. 657, 25 S. W. 565 (*semble*); *Bufs v. Price, C. & N.* 68; *Chapman v. Fish*, 6 Hill, 554; *Graeme v. Harris*, 1 Dall. 456; *Dodge v. Wetmore*, Brayt. 92; *Dickinson v. M'Craw*, 4 Rand. 158. Thus an administrator appointed in Maryland before the cession of the District of Columbia to the United States cannot sue in the District after cession. *Fenwick v. Sears*, 1 Cr. 259. If a foreign administrator sues in Massachusetts and is allowed to recover judgment, which is satisfied, suit by a Massachusetts administrator, subsequently appointed, is not barred. *Pond v. Makepeace*, 2 Met. 114.

So a foreign executor or administrator cannot bring a bill of revivor in a suit begun by the deceased before his death. *Barclift v. Treece*, 77 Ala. 528; *Greer v. Ferguson*,

The question remains whether, as against these defendants, the plaintiff has proved himself to be a creditor of Stewart. The only evidence on this point, as already observed, is the record of the proceedings before commissioners appointed by the Probate Court in Michigan. It becomes necessary therefore to consider the nature and the effect of those proceedings.

They were had under the provisions of the General Statutes of Michigan (2 Howell's Statutes, §§ 5888-5906), "the general idea" of which as stated by Judge Cooley, "is that all claims against the estates of deceased persons shall be duly proved before commissioners appointed to hear them, or before the Probate Court when no commissioners are appointed. The commissioners act judicially in the allowance of claims, and the administrator cannot bind the estate by admitting their correctness, but must leave them to be proved in the usual mode." *Clark v. Davis*, 32 Mich. 154, 157. The commissioners, when once appointed, become a special tribunal, which, for most purposes, is independent of the Probate Court, and from which either party may appeal to the Circuit Court of the county; and, as against an adverse claimant, the administrator, general or special, represents the estate, both before the commissioners and upon the appeal. 2 Howell's Statutes, §§ 5907-5917; *Lothrop v. Conely*, 39 Mich. 757. The decision of the commissioners, or of the Circuit Court on appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. *La Roe v. Freeland*, 8 Mich. 530. But, as between the parties to the controversy, and as to the payment of the claim out of the estate in the control of the Probate Court, it has the effect of a judgment, and cannot be collaterally impeached by either of those parties. *Shurbun v. Hooper*, 40 Mich. 503.

Those statutes provide that when the administrator declines to appeal from a decision of the commissioners, any person interested in the estate may appeal from that decision to the Circuit Court; and that, when a claim of the administrator against the estate is disallowed by the commissioners and he appeals, he shall give notice of his appeal to all concerned by personal service or by publication. 2 Howell's Statutes, §§ 5916, 5917. It may well be doubted whether, within the spirit and intent of these provisions, the administrator, when he is also the claimant, is not bound to give notice to other persons interested in the estate, in order that they may have an opportunity to contest his claim before the commissioners; and whether an allowance of his claim, as in this case, in the absence of any impartial representative of the

56 Ark. 324; *Goodwin v. Jones*, 3 Mass. 514. And therefore a foreign executor may not dismiss a suit begun by his testator. *Warren v. Eddy*, 13 Abb. Pr. 28.

In Michigan it has been held that a foreign executor may bring and maintain a suit upon a claim of the testator, provided he obtains letters of administration in Michigan before trial. *Gray v. Franks*, 86 Mich. 382, 49 N. W. 130. See also *Hodges v. Kimball*, 91 Fed. 845. In several States a foreign executor is allowed to sue by statute. *Lawrence v. Nelson*, 143 U. S. 215; *Bell v. Nichols*, 38 Ala. 678. — Ed.

estate, and of other persons interested therein, can be of any binding effect, even in Michigan. See *Lothrop v. Conely*, above cited.

But we need not decide that point, because upon broader grounds it is quite clear that those proceedings are incompetent evidence, in this suit and against these defendants, that the plaintiff is a creditor of Stewart or of his estate.

A judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them.

A judgment recovered against the administrator of a deceased person in one State is no evidence of debt, in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. *Aspden v. Nixon*, 4 How. 467; *Stacy v. Thrasher*, 6 How. 44; *McLean v. Meek*, 18 How. 16; *Low v. Bartlett*, 8 Allen, 259.

In *Stacy v. Thrasher*, in which a judgment, recovered in one State against an administrator appointed in that State, upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the Circuit Court of the United States held within another State against an administrator there appointed of the same intestate, the reasons given by Mr. Justice Grier have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from:—

“The administrator receives his authority from the ordinary, or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction.” 6 How. 58.

In answering the objection that to apply these principles to a judgment obtained in another State of the Union would be to deny it the faith and credit, and the effect, to which it was entitled by the Constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel only between the same parties, or their privies, or on the same subject-matter when the proceeding was *in rem*; and that the parties to the judgments in question were not the same; neither were they privies, in blood, in law, or by estate; and proceeded as follows:

“An administrator under grant of administration in one State stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the

other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts." 6 How. 59, 60.

"It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger." "The laws and courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta*. It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel." 6 How. 60, 61.

In *Low v. Bartlett*, above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: "The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor." 8 Allen, 266.

In the case at bar, the allowance of Johnson's claim by the commissioners appointed by the Probate Court in Michigan, giving it the utmost possible effect, faith, and credit, yet, if considered as a judgment *in rem*, bound only the assets within the jurisdiction of that court, and, considered as a judgment *inter partes*, bound only the parties to it and their privies. It was not a judgment against Stewart in his lifetime, nor against his estate wherever it might be; but only against his assets and his administrator in Michigan. The only parties to the decision of the commissioners were Johnson, in his personal capacity, as claimant, and Johnson, in his representative capacity, as administrator of those assets, as defendant. The present defendants were not parties to that judgment, nor in privity with Johnson in either capacity. If any other claimant in those proceedings had been the plaintiff here, the allowance of his claim in Michigan would have been no evidence

of any debt due to him from the deceased, in this suit brought in New York to recover alleged property of the deceased in New York from third persons, none of whom were parties to those proceedings or in privity with either party to them. The fact that this plaintiff was himself the only party on both sides of those proceedings cannot, to say the least, give the decision therein any greater effect against these defendants.

The objection is not that the plaintiff cannot maintain this bill without first recovering judgment on his debt in New York, but that there is no evidence whatever of his debt except the judgment in Michigan, and that that judgment, being *res inter alios acta*, is not competent evidence against these defendants.

This objection being fatal to the maintenance of this bill, there is no occasion to consider the other questions, of law or of fact, mentioned in the opinion of the Circuit Court and discussed at bar.

*Decree affirmed.*¹

BROWN, J., dissenting.²

VANQUELIN v. BOUARD.

COMMON PLEAS. 1863.

[Reported 15 Common Bench, New Series, 341.]

ERLE, C. J.³ — Upon the argument of these demurrers, several questions have been raised with reference to the French law. The founda-

¹ *Acc.* Taylor v. Brown, 35 N. H. 484. And so a Massachusetts executor cannot prove in the Massachusetts Probate Court a balance allowed him on an accounting as ancillary administrator in a foreign court. *Ela v. Edwards*, 13 All. 48.

So generally a judgment obtained in one State against the representative of the deceased there appointed will not be recognized in another State in a suit against the representative there. *Aspden v. Nixon*, 4 How. 467; *McLean v. Meek*, 18 How. 16; *Dent v. Ashley*, Hemph. 54; *Arizona Cattle Co. v. Huber (Ari.)*, 33 Pac. 555; *Turner v. Risor*, 54 Ark. 33; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833; *McGarvey v. Darnall*, 134 Ill. 367, 25 N. E. 1005; *Creswell v. Slack*, 68 Ia. 110; *Low v. Bartlett*, 8 All. 259; *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38; *Brodie v. Bickley*, 2 Rawle, 431; *King v. Clarke*, 2 Hill Eq. 611; *Jones v. Jones*, 15 Tex. 463; *Price v. Mace*, 47 Wis. 23; *Tighe v. Tighe, Jr.* 11 Eq. 203. *Contra*, *Creighton v. Murphy*, 8 Neb. 349, 1 N. W. 133, where process was served on the deceased before his death. This is true even though the foreign administrator was the same person as the domestic representative. *Johnson v. McKinnon*, (Ala.) 29 So. 696; *S. v. Fulton*, (Tenn. Ch.) 49 S. W. 297.

In Louisiana it has been held that judgment against an executor may be enforced against him in any other State in which he has also been appointed executor. *Turley v. Dreyfus*, 33 La. Ann. 885. And in a few States it has been held that where judgment has been obtained against an executor he may be sued on it personally in another State. *Latine v. Clements*, 3 Ga. 426; *White v. Archbill*, 2 Sneed, 588. — Ed.

² The dissenting opinion is omitted. — Ed.

³ The statement of facts, arguments of counsel, and part of the opinion, in which the validity of certain pleas is discussed, are omitted. WILLIAMS and KEATING, JJ., delivered concurring opinions. — Ed.

tion of the litigation was certain bills of exchange of which the deceased, Jacques Alexander François Vanquelin, was drawer, the defendant the acceptor, and one Bolli the indorsee. Bolli brought an action against both drawer and acceptor in the Court of the Tribunal de Commerce of the department of the Seine, and obtained judgment against them. Vanquelin, the drawer, died: his widow, the now plaintiff, in accordance with the laws of France, became the donee of the universality of the real and personal estates belonging to the succession of the deceased at his death; and she alleges that thereby and according to the laws of France all rights, claims, and causes of action, and all liabilities and obligations of the deceased vested in her personally and absolutely, and she became, according to the said laws, liable personally upon the said judgment, and also entitled personally and in her own name to sue for and enforce all the rights and claims of the deceased, and that she was according to the said laws substituted for and placed in the same position with respect to the defendant, as regarded the said bills of exchange and the judgment thereon, to all intents and purposes, as the deceased had been in his lifetime. The count then goes on to allege that afterwards, and whilst the judgment was in full force and unsatisfied, and the plaintiff and defendant were both liable thereupon, the plaintiff, in accordance with the laws of France, was obliged to pay and did pay the full amount of the judgment and all interest due thereon, and that thereupon Bolli delivered to her the said bills of exchange and the record of the said judgment, and the plaintiff then became and still was according to the laws of France entitled to the benefit of all the rights of Bolli upon the said judgment against the defendant, and entitled to enforce the same against the defendant, and to be substituted for Bolli in all his rights against the defendant in respect of the said judgment; and that the defendant became indebted and liable to pay her the amount so paid by her upon the said judgment, with 6 per cent interest thereon until payment. The count then goes on to allege that the plaintiff, having these rights, in order to keep alive the liability of the defendant, and to prevent the same from being barred by lapse of time, and in order to give effect to and enforce her claim against the defendant, took proceedings in the Tribunal Civil of the First Instance of the department of the Seine, and that thereupon, according to the practice and procedure of the said court, on the 2d of April, 1862, by adjudication of the said court an injunction was made to the defendant to pay certain sums of money for principal, interest, and costs, and it was adjudged and notified to the defendant that he would be constrained to do so by all lawful means and by arrest of his body. That is the substance of the first count. The substance of the second count is, that certain bills of exchange were drawn upon the defendant by the deceased, and accepted by him, and dishonoured; that the deceased died, and the plaintiff was according to the laws of France the donee of the universality of the personal and real estates belonging to the succession of the deceased, and thereupon became entitled to all debts,

claims, and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely, in the same manner to all intents and purposes as they were vested in the deceased, and the plaintiff was entitled to demand and sue for the same in her own name and in her own right, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and she became entitled to sue the defendant thereupon in her own name and in her own right; and she demands payment of the amount thereof and interest. The ground of the demurrer to these two counts, is, that the plaintiff is in effect suing in a representative character, which she cannot do without having obtained letters of administration in this country. The allegation in both counts is, that, being donee of the universality of the personal and real estates belonging to the succession of her deceased husband, the plaintiff became according to the laws of France entitled to all the property and rights of the deceased absolutely in her own right, and not in any representative capacity. I am of opinion that that averment, if it were necessary to stand upon it, must be taken to be true, and so it appears upon the record that the law of France, in which country all the parties were domiciled, would give her a *locus standi* to sue there in her personal capacity. But it is not necessary to rest upon that. The first count shows, that, after the death of her husband, the plaintiff paid the amount due to Bolli in respect of the bills and the judgment; and that, it seems, would give her the right to sue in the courts of France in her own name and in her own right, as indeed it would in this country also. It has on many occasions been held that an executor or administrator has his election to sue either in his own right or in his representative character in respect of transactions arising since the death of the testator or intestate, although what is recovered would be assets in his hands. Here, the alleged cause of action is founded mainly upon what was done by the plaintiff after the death of her husband. There is a further answer to the demurrer to the first count, viz. that the rights of the plaintiff were confirmed by the second adjudication or injunction obtained by her in the Tribunal Civil of the First Instance of the department of the Seine, which entitled her to execution against the defendant in that country. It seems to me, therefore, that there is abundant on the first count to show that the plaintiff has a good cause of action against the defendant in her individual capacity, without having recourse to the special matter before adverted to. As to the demurrer to the second count, it is clear that the plaintiff took the bills on the death of her husband, and, if nothing more appeared, she could only enforce them here by clothing herself with the character of his representative. But the law of domicile attaches to these parties; and there is a distinct averment that the plaintiff was, according to the laws of France, "the donee of the universality of the personal and real estates belonging to the succession of the deceased, and thereupon became entitled to all debts, claims,

and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely in the same manner to all intents and purposes as they were vested in the deceased, and the plaintiff was and is entitled to demand and sue for the same *in her own name and in her own right*, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and the plaintiff became entitled to sue the defendant thereupon *in her own name and in her own right*." I think it sufficiently appears upon this record that the plaintiff was entitled to sue upon these bills in her own right; the fact of her being the donee of the universality of the personal and real estates belonging to the succession of her deceased husband giving her by the law of France rights different from those which an executor or an administrator has in this country. I am therefore of opinion that the plaintiff is entitled to our judgment upon the demurrers to both counts of the declaration.¹

CURRIE v. BIRCHAM.

KING'S BENCH. 1822.

[Reported 1 Dowling & Ryland, 35.]

ASSUMPSIT for money had and received by the defendants to the plaintiff's use. The defendants pleaded the general issue; the statute of limitations; and several special pleas. The question at the trial arose upon the plea of the general issue. At the trial before ABBOTT, C. J., at the Guildhall Sittings after last Michaelmas Term, the case proved in evidence was this: In the year 1806, Norman Newby, quartermaster of the 84th regiment of foot, went out to India, indebted to the plaintiff, a laceman in London, and to other tradesmen, for his military equipments, and other property of considerable value. Shortly after his arrival in India, he died intestate. His wife took

¹ Where by the law of the domicile of the deceased a universal successor legally becomes entitled at the death to all his rights and subject to all his liabilities, such successor may sue or be sued upon such rights or liabilities in a foreign State. *Beavan v. Hastings*, 2 K. & J. 724; *King v. Martin*, 67 Ala. 177.

A representative may sue in a foreign State upon any right which did not form part of the estate of the deceased, but accrued to him after the death, even though he will be accountable as such representative to his court for what he recovers. *Perkins v. Stone*, 18 Conn. 270; *Steitler v. Helenbush*, (Ky.) 61 S. W. 701. Thus he may sue upon a note running to him as administrator: *Rittenhouse v. Ammerman*, 64 Mo. 197; *Tillman v. Walkup*, 7 S. C. 60; upon a judgment assigned to him as administrator: *Rucks v. Taylor*, 49 Miss. 552; upon a policy of insurance taken out by him on the property of the estate: *Abbott v. Miller*, 10 Mo. 141; to recover a deposit he has made as administrator in a foreign bank: *Bingham v. Marine Nat. Bank*, 112 N. Y. 661, 19 N. E. 416; to recover dividends on stock in a foreign corporation: *Smith v. Cuyler*, 78 Ga. 654, 3 S. E. 406. — ED.

out letters of administration of his effects in the Recorder's Court at Bombay; and, having collected some of his effects, realized the proceeds in government bills, drawn on England, and returned to this country, leaving a brother officer of her husband to collect the remainder of his effects, and remit the proceeds in like manner, for her account, after she quitted India. The defendants' testator, John Moore, had been Mr. Newby's agent, and all the bills in question came to his hands through the medium of Mrs. Newby, and as was alleged, converted by him into cash. The plaintiff being unable to obtain payment of his debt, in the year 1816, took out letters of administration of the estate and effects of Mr. Newby, as his creditor, in the Prerogative Court of the Archbishop of Canterbury, and filed a bill in Equity against Mr. Moore, and Mrs. Newby (who was then married to another husband), to account for the money which had come into their hands, the property of the intestate. In his answer to this bill, filed in 1817, Mr. Moore stated, that he had paid over all the money which had come to his hands, to Mrs. Newby, as the administratrix of her husband's effects and as her agent, with the exception of a sum of £170 which he retained for a debt contracted with him by the intestate when living. Mr. Moore afterwards died, and by his will appointed the defendants his executors, against whom the present action was brought. At the trial, the plaintiff's claim was reduced to the sum of £170 which Mr. Moore, in his answer to the bill in Chancery, admitted he had retained in his hands for a debt due to him from the intestate. The question was, as to the plaintiff's right to sue. It was objected, that the letters of administration granted by the Recorder's Court at Bombay to Mrs. Newby, must prevail against the administration granted to the plaintiff in this country, and that if any action lay against Moore's executors, it must be at the suit of Mrs. Newby, he having been her agent. Of this opinion was ABBOTT, C. J., who nonsuited the plaintiff, but gave him leave to move to enter a verdict for the sum of £170 above-mentioned, if the court should be of opinion that the action was well brought.

Marryat now moved accordingly to set aside the nonsuit, and enter a verdict for the plaintiff for £170. He contended, that the plaintiff was entitled to maintain this action by virtue of the letters of administration granted to him in this country. Admitting that the letters of administration granted to Mrs. Newby, in the Recorder's Court of Bombay, to be valid and effectual in that country, still they could not operate here; and therefore it was incumbent on Mrs. Newby, if she meant to act as administratrix of her husband's effects, to have taken out letters of administration in this country. This she had not done; and the letters granted to her in India could not prevail against those which had been granted to the plaintiff by the Prerogative Court. The operation of her letters had ceased on her quitting India. Then, as the effects of Newby were not realized until they reached this country, when the bills were converted into cash, the plaintiff was entitled to administer that

money by virtue of the administration which he had obtained, and consequently this action was well brought. *Vide* *Tourton v. Flower*, 3 P. Wms. 369; *Jannery v. Sealey*, 1 Vent. 39; and 26 Geo. III. c. 57.

PER CURIAM. We are of opinion that this action will not lie at the suit of this plaintiff. The wife of the intestate is entitled to all the effects of which her husband died possessed in India, by virtue of the letters of administration granted to her in that country. It is not suggested that the sum of money in question was not a part of the proceeds of the intestate's effects. The effects are remitted to this country by her in the shape of bills, and they come to the hands of her agent Moore. He receives the money to her use, and in her own right as administratrix. If she has any claim upon the money, which it is alleged that Moore retained in his hands, she may maintain an action, but it will not lie at the suit of this plaintiff, under the letters of administration which he has obtained.

*Rule refused.*¹

PETERSEN *v.* CHEMICAL BANK.

COURT OF APPEALS, NEW YORK. 1865.

[*Reported* 32 *New York*, 21.]

THIS action was brought in the Superior Court of New York to recover the sum of \$32,321.24, being an amount standing to the credit of Aaron Cohen, as a dealer on the books of the defendants' bank in New York. Cohen died at the city of New Haven in Connecticut, on the 27th day of July, 1862. He left a last will and testament, executed in New York, on the 11th June, 1861, which was duly attested by two witnesses, by which he appointed David McCoard and Cohen M. Soria of New Orleans, executors. The will was proved and admitted to record in the Probate Court of the District of New Haven, in September, 1862; and the executors not appearing to qualify, and one of them having renounced, administration with the will annexed was granted to David J. Peck of New Haven, he giving a bond with several sureties, in the penalty of \$200,000, conditioned to make an inventory, and to account, etc. He demanded of the defendants the above amount standing to the credit of Cohen, presenting an authenticated copy of his appointment, but payment was declined. He then, on the 2d December 1862, made a transfer under his hand and seal of the debt due from the defendants to the plaintiff in this action. The

¹ *Acc.* *Williamson v. Branch Bank*, 7 Ala. 906; *Holcomb v. Phelps*, 16 Conn. 127; *Norton v. Palmer*, 7 Cush. 523; *Dorsay v. Connell*, 22 N. B. 564. *Contra*, *Naylor v. Moffatt*, 29 Mo. 126. And see *Bond v. Graham*, 1 Hare 482.

Where personal property is brought into a State after the death of the deceased, the executor or administrator appointed in the State where the property was at the death may sue in the former State for injury to the property. *Clark v. Holt*, 16 Ark. 257; *Embry v. Millar*, 1 A. K. Marsh. 300.—Ed.

instrument is expressed to be in consideration of \$32,321.24 received to the assignor's full satisfaction; and it contains proper words of sale and assignment, and a guaranty of the collection of the amount, and a promise to indemnify the plaintiff against loss by reason of the purchase. The plaintiff called at the bank with this instrument, presenting his own check and also that of Peck, and demanded the money. He also exhibited an instrument, signed by all the legatees named in the will, with the exception of one who resided in an insurgent State, and who was entitled to one-sixth of the residue, requesting that the money might be paid over to Peck as administrator; but the defendant persisted in refusing payment, on the ground, apparently, that it could not safely be paid, except to an administrator appointed under the laws of this State.

The controverted questions of fact to which the evidence on the trial was directed, related to the domicile of Cohen at the time of his death, and to the circumstances under which the transfers to the plaintiff were made.¹

It was very clearly proved that he owed no debts in New York, and only a few very small sums in New Haven. The legatees in his will, besides \$15,000 to a friend in New York and \$5,000 to another in New Orleans, and \$5,500 to his servants, were his brothers and sisters in New York, New Orleans, and Philadelphia.

In regard to the transfer, the evidence was that the plaintiff was one of the sureties of Peck in the administration bond, and had acted as his agent in the settlement of the estate. The consideration did not appear to have been paid absolutely. The amount was advanced by the plaintiff, and, together with other moneys of the estate, was deposited in a bank in the name of the plaintiff as trustee, he having, however, by the arrangement, no right to claim it, except by the direction of Peck, the intention apparently being that it should be paid out in the course of administration.

The defendant's counsel moved for the dismissal of the complaint, on the grounds that an action would not lie by an assignee of a foreign administrator; that there was no consideration for the transfer, and that it was made to evade the laws of this State, and that the Probate Court in Connecticut had not jurisdiction; and the counsel also insisted that the question as to the domicile of Cohen should, at least, be submitted to the jury. The motion was denied, and the judge instructed the jury to find for the plaintiff. The defendant's counsel excepted. It was directed that the exceptions be heard, in the first instance, at the General Term. The verdict was for the plaintiff for the amount claimed, with interest; and judgment for the plaintiff was rendered thereon at the General Term, upon which the defendant brought this appeal.

¹ So much of the statement of facts and opinion as involve the decision of this question of fact is omitted. The arguments of counsel and concurring opinion of PORTER, J., are also omitted. — ED.

DENIO, C. J. The evidence was quite conclusive that the domicile of Cohen at the time of his death was at New Haven. . . . A foreign executor or administrator (and one appointed under the laws of a sister State of the Union is foreign in the sense of the rule), cannot sue in his representative character in the courts of this State. The question whether a party deriving title to a chose in action by transfer from such an executor or administrator, can prosecute the debtor residing here, in our courts, has been variously decided in the cases to which we have been referred. In the Supreme Court in the first district, the Merchants' Bank of New York was sued for refusing to transfer to the plaintiff one hundred shares of its stock, to which the latter made title by transfers from the executors of one Robert Middlebrook, in whose name the stock stood on the books of the bank. He died at his residence in Connecticut, and his will had been proved, and letters testamentary had been issued by the Probate Court of the proper district in that State. The plaintiff was a legatee of a certain amount of the testator's stock, and the shares in controversy had been assigned to him in satisfaction of the legacy. The court held that the executors became vested with the title to the stock, and that the plaintiff, though he derived his title under them, could enforce his right against the bank in our courts, and judgment was accordingly given in his favor. *Middlebrook v. The Merchants' Bank*, 27 How. Pr. 474; s. c. at Special Term, 24 How. Pr. 267.

A different rule has been established in the courts of New Hampshire and of Maine. *Thompson v. Wilson*, 2 N. H. 291; *Stearns v. Burnham*, 5 Greenl. 261. In each of these cases the defendant was sued as the maker of a promissory note, by parties claiming as indorsees under indorsements by the executors of the payees who were respectively residents of Massachusetts, and whose wills were proved and letters thereon issued in that State. The defendants prevailed in each case, on the objection that the respective plaintiffs were subject to the same disability to sue which would have attached to the executors if they had attempted to prosecute in another State than that under whose laws their letters testamentary were granted. In the first case the judgment was placed upon the English ecclesiastical law, by which probates of wills and grants of administration are void when not made by the *ordinary* of the proper diocese, a doctrine which I do not think applicable to questions arising between different States, as it makes no allowance for the principles of international comity. In the case in Maine, it was thought that allowing a recovery would be an indirect mode of giving operation in Maine to the laws of Massachusetts, and also that the effects of the deceased might thereby be withdrawn from the State, to the prejudice of creditors residing there.

The precise case now before us came before the Supreme Court of the United States in *Harper v. Butler* (2 Pet. 239). The suit was brought in Mississippi, on a chose in action, originally existing in favor of a citizen of Kentucky, who died there, and whose executor

having letters testamentary issued in that State, assigned it to the plaintiff. In Mississippi, choses in action are assignable so as to permit the assignee to sue in his own name, as is now the case in this State. The question arose on demurrer to the complaint, and the District Court sustained the demurrer. The judgment was reversed upon a short opinion by Chief Justice Marshall, which merely states the point, and contains no general reasoning. No counsel appeared on behalf of the defendant.

The case in Maine has been made the subject of comment in Story's *Treatise on the Conflict of Laws* (§§ 258, 259), and is decidedly disapproved by the learned writer. He says, that upon the reasoning of the case a promissory note would cease to be negotiable after the death of the payee, which, he observes, would certainly not be an admissible proposition.

It seems clear to me that there are no precedents touching the question which are binding upon this court, or which can relieve it from the duty of examining the question upon principle. There are certain legal doctrines, now very well established, which have a strong bearing upon the point. It is very clear, in the first place, that neither an executor or administrator, appointed in a foreign political jurisdiction, can maintain a suit in his own name in our courts. Foreign laws have no inherent operation in this State; but it is not on this account solely or principally that we deny foreign representatives of this class a standing in our courts. The comity of nations, which is a part of the common law, allows a certain effect to titles derived under and powers created by the laws of other countries. Foreign corporations may become parties to contracts in this State, and may sue or be sued in our courts on contracts made here or within the jurisdiction which created them. The only limitation of that right is the inhibition to do anything in its exercise which shall be hostile to our own laws or policy. *Bank of Augusta v. Earle*, 13 Pet. 519; *Bard v. Poole*, 2 Kern. 495, 505, and cases cited. And yet nothing can be more clearly the emanation of sovereign political power than the creation of a corporation. Again, the receivers of insolvent foreign corporations, and assignees of bankrupt and insolvent debtors, under the laws of other States and countries, are allowed to sue in our courts. It is true their titles are not permitted to overreach the claims of domestic creditors of the same debtor, pursuing their remedies under our laws; but in the absence of such contestants they fully represent the rights of the foreign debtors. Story's *Conf. Laws*, § 112; *Hoyt v. Thomasen*, 1 Seld. 320; s. c. 19 N. Y. 207; *Willets v. Waite*, 25 N. Y. 584. It is not therefore because the executor or administrator has no right to the assets of the deceased, existing in another country, that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere. Reasons of form, and a solicitude to protect the rights of creditors and

others, resident in the jurisdiction in which the assets are found, have led to the disability of foreign executors and administrators, which disability, however inconsistent with principle, is very firmly established. We have lately decided that if the debtors of the deceased will voluntarily pay what they owe to the foreign executor, such payment will discharge the debts, and the moneys so collected will be subject to the administration of such foreign executor. *Parsons v. Lyman*, 20 N. Y. 103.

But the principle of law which I think governs this case is, that the succession to the personal estate of a deceased person is governed by the law of the country of his domicil at the time of his death. This is so whether the succession is claimed under the law providing for intestacy or for transmission by last will and testament. See *Parsons v. Lyman*, *supra*, and authorities cited at p. 112. It is not so held because the foreign legislature or the local institutions have any extra-territorial force, but from the comity of nations. Accordingly, it is a necessary supplement to the doctrine that, if the law-making power of the State where the property happens to be situated, or the debtor of the deceased reside, to subserve its own policy, has engrafted qualifications or restrictions upon the rights of those who would succeed to the estate by the law of the domicil, they must take their rights subject to such restrictions. One of the most natural, as well as the most usual of these qualifications is that which is intended to secure the creditors of the deceased residing in the country where the assets exist. It is in part to subserve this policy that the personal representatives are not permitted to prosecute the debtor or parties who withhold his effects in our courts. But the protection to the creditor is further secured by the remedy which is provided by allowing them to take out administration in the jurisdiction where the assets are. If the deceased have any relatives in this State who would be preferably entitled, they can be summoned, and if they elect to take out letters themselves, they will be compellable to give bond, and the creditors will be then made secure in their rights, or if the relatives refuse to assume that responsibility, then the creditors may themselves be appointed, and thus qualified to take possession of the assets here upon the same terms. 2 R. S. 73, §§ 23, 24. If the debtors of the estate elect to pay to the former representative, or to deliver to him the movable assets, before the granting of administration in this State, the domestic creditors are put to the inconvenience of asserting their rights in the courts of the country of their debtor's domicil against his representatives appointed under the laws of that country, just as they would have been compelled to do if all his effects had been situated there. Another general principle of law necessary to be averted to is, that the executor of a testator, as soon at least as he has clothed himself with the commission of the Probate Court, is vested with the title to all the movable property and rights of action which the deceased possessed at the instant of his death. The title of the executor,

it is true, is fiduciary and not beneficial. That title is, however, perfect against every person except the creditors and legatees of the deceased. The devolution of ownership is direct to the representative, and the beneficiaries take no title in the specific property which the law can recognize. An administrator with the will annexed, has the same rights of property as the executor named in the will would have had if he had qualified. 2 R. S. 72, § 22.

The law of maintenance while it existed, prohibited the transfer of the legal property in a chose in action, so as to give the assignee a right of action in his own name. But this is now abrogated, and such a demand as that which is asserted against the defendant in this suit may be sold and conveyed so as to vest in the purchaser all the legal, as well as the equitable rights of the original creditor. Code, § 111. Though such demands are not negotiable in precisely the same sense as commercial paper, since the assignee is subject to every substantial defence which might have been made against the assignor, yet where, as in this case, no such defence exists, the transfer is absolute and complete. The title which is vested in the executor carries with it the *jus disponendi* which generally inheres in the ownership of property. "It is a general rule of law and equity," says Judge Williams, in his treatise on executors, "that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee." Treatise, p. 796; see also *Whale v. Booth*, 7 Term R. 625, in note to *Farr v. Newman*; *Sutherland v. Breesh*, 7 Johns. Ch. 17; *Rawlinson v. Stone*, 3 Wils. 1; *Harper v. Butler*, *supra*.

It follows that the plaintiff presented himself to the Superior Court as the owner by purchase and assignment of the debt against the defendant, from a person holding the title and hence having authority to sell. He claimed to recover, not as the representative of any other party, but as the substituted creditor of the defendants' bank. He had, it is true, to make title through the will of Cohen, and the proceedings of the Probate Court of Connecticut. But the validity of that title depended upon the law of Connecticut, that being the place of the domicil of the former owner of the demand. The validity of every transfer, alienation, or disposition of personal property depends upon the law of the owner's domicil. Story on Conf. of Laws, § 383. In the absence of proof to the contrary, we assume the law of Connecticut respecting the alienation of choses in action to be the same as our own. If Cohen had, at his death, been a resident of this State, and his administrator with the will annexed had sold and assigned to the plaintiff his demand against the bank, there is no manner of doubt but that the assignee, upon the refusal of the bank to pay the amount, could have maintained this action.

Hence there is not, I think, any reason why the plaintiff should be precluded from maintaining his action, on account of his making title

through a foreign administration. The rule is not that our courts do not recognize titles thus acquired. It is simply that a foreign executor or administrator can have no standing in our courts. The plaintiff does not occupy that position. He sues in his own right and for his own interest, and represents no one. In my opinion, the disability to sue does not attach to the subject of the action, but is confined to the person of the plaintiff. If he is an unexceptionable suitor, and there is no rule of form or of policy which repels him from our courts, he is to be received, and he may make out his title to the subject claimed, in any manner allowed by law; and it has been shown that title acquired through a foreign administration is universally respected by the comity of nations.

It is pretty obvious from the evidence of the circumstances of the transfer by Peck to the plaintiff, that its object was to avoid the objection which might be taken if Peck had sued in his own name as administrator, without taking out letters here. There was no other conceivable motive for the plaintiff to purchase this moneyed demand payable immediately, for its precise amount paid down. If his check on the bank, drawn shortly after the transfer, had been answered, he would have received the precise amount he had parted with, and the transaction at the best would have been paying with one hand to receiving the same amount back with the other. If he failed to realize the amount, he was to be indemnified by Peck. This circumstance, and the manner in which the assumed consideration was disposed of, would doubtless have led the jury to find, that the form adopted was resorted to in order to enable the administrator to avail himself of the balance in the defendant's bank, without taking out administration here. Still, as between the plaintiff and Peck, the interest in the demand passed. Peck would have been estopped by his conveyance under seal, containing an acknowledgment of the payment of the consideration, from setting up that nothing passed by the conveyance. I am of opinion that the defendant cannot make a question as to the consideration. If all the parties had been residents of this State, a transfer of the demand, good as between the parties to that transfer, would have obliged the defendant to respond to the action of the transferee. Then if we hold, as I think we should, that the objection to the suit of the administrator was in the nature of a personal disability to sue, and not an infirmity inhering in the subject of the suit, the fact that the transfer was made for the purpose of getting rid of the objection, should not prejudice the plaintiff. The cases which have been referred to upon this point have considerable analogy. The Constitution and laws of the United States confer upon the courts of the Union jurisdiction in suits between citizens of different States, with an exception contained in an act of Congress, of one suing as the assignee of a chose in action, of a party whose residence was such as not to permit him to sue. In an action by an assignee concerning the title to land, which was not within the exception, it was held not to

be an objection which the defendant could take, that the assignment was made for the purpose of removing the difficulty as to jurisdiction. *Briggs v. French*, 2 Sumn. 251. In a late case in this court against a foreign corporation, which could not be prosecuted here except by a resident of this State, unless the cause of action arose here or the subject of the action was situated here, it was held that the objection — that the assignment of the demand by one not qualified by his residence to sue, to the plaintiff who was thus qualified, was made for the purpose of avoiding the difficulty — could not be sustained. *McBride v. The Farmers' Bank*, 26 N. Y. 450.

I have not thus far referred to the circumstance, that Cohen was shown not to have owed any debts in this State. That fact was proved as strongly as in the nature of the case such a position could be established. The administrator, whose business it was to ascertain the existence of debts, and the confidential servant of Cohen who was very familiar with his transactions, affirmed that there were none; and the defendant gave no evidence on the subject. The motive of policy for forbidding the withdrawal of assets to the prejudice of domestic creditors, did not therefore exist in this case. Still, if the rule is that neither the foreign administrator or his assignee can maintain an action in our courts to collect a debt against a debtor residing here, on account of its tendency to prejudice domestic creditors, the exceptional features of the present case would not change the principle. It would often be more difficult than in this case to disprove the existence of such debts. But I am of opinion that the objection should be regarded as formal, and that it does not exist where the plaintiff is not a foreign executor or administrator but sues in his own right, though his title may be derived from such a representative.

I am in favor of affirming the judgment of the Supreme Court.

*Judgment affirmed.*¹

¹ *Acc. Harper v. Butler*, 2 Pet. 239; *Camp v. Simon*, (Utah) 63 Pac. 332; *Munson v. Exchange Nat. Bank*, 19 Wash. 125, 52 Pac. 1011. But see *Heyward v. Williams*, 57 S. C. 235, 35 S. E. 503. Where negotiable paper, part of the estate, is transferred by the representative appointed in the State of domicile of the deceased, the transferee may sue in another State in his own name. *Campbell v. Brown*, 64 Ia. 425; *Rand v. Hubbard*, 4 Met. 252 (*semble*); *Owen v. Moody*, 29 Miss. 79; *Gove v. Gove*, 64 N. H. 503, 15 Atl. 121 (see *Thompson v. Wilson*, 2 N. H. 291); *Mackay v. St. Mary's Church*, 15 R. I. 121, 23 Atl. 108. *Contra*, *Stearns v. Burnham*, 5 Me. 261; *McCarty v. Hall*, 13 Mo. 480. So a foreign representative may sue in his own name on a note payable to bearer. *Knapp v. Lee*, 42 Mich. 41, 3 N. W. 244. And if he is allowed by statute to sue, in a foreign State, he may sue on a note payable to the deceased, though there is a local representative. *Eells v. Holder*, 2 McCrary, 622, 12 Fed. 668. So a foreign executor may present a note payable to his testator for payment or protest. *Rand v. Hubbard*, 4 Met. 252.

When the representative at the domicile of the deceased transfers stock, the transferee may have the stock transferred to his name on the books. *Brown v. S. F. Gaslight Co.*, 58 Cal. 426; *Luce v. R. R.*, 63 N. H. 589, 3 Atl. 618; *Middlebrook v. Merchants' Bank*, 3 Keyes, 135, 3 Abb. Dec. 295. And a foreign executor has a right to vote on stock belonging to his testator. *In re Election of Cape May, &c. Nav. Co.*, 51 N. J. L. 78, 16 Atl. 191. — Ed.

THURBER *v.* CARPENTER.

SUPREME COURT OF RHODE ISLAND. 1895.

[*Reported 18 Rhode Island, 782.*]

STINESS, J. This is a bill to enjoin the completion of a sale of real estate in Pawtucket, in this State, under a power of sale contained in a mortgage given by the complainants to William Carpenter, deceased, late of Attleborough, Massachusetts, and also to set aside the mortgage. The respondent, Edwin F. Carpenter, was duly appointed administrator upon the estate of William Carpenter in Massachusetts, and under the power in the mortgage, which ran to the mortgagee, his executors, administrators, and assigns, he advertised the property for sale at public auction, and sold the same to the respondent Phillips. The preliminary question, whether a foreign administrator can execute such a power in this State, is the one which is now argued to the court. The advertisement of the sale was signed by "Edwin F. Carpenter, assignee of the mortgagee," and the complainants urge that he was not an assignee, because there had been no formal assignment of the mortgage to him, and also that as administrator in another State he had no standing or power to act as such in this State. In *Douglas v. Hennessy*, 15 R. I. 272, it was held that an administrator is an "assign" of his intestate by act of law, if such a construction comports with the character and intent of the instrument, as it certainly does in this case. The proper name having been signed by one who was in fact an assignee, we do not see that there was need to set out the mode of the assignment, whether by act of the parties or by act of law. But the question remains: Could he, as a foreign administrator, execute the power in this State?

There can be no doubt of the rule that an administrator cannot sue, as such, outside of the State where he is appointed; nor of the rule that as to real estate the law of the place where it lies is to govern in case of its transfer. Under these rules it has been held that a foreign administrator cannot assign a mortgage, where it affects the title to real estate. *Cutter v. Davenport*, 1 Pick. 81, was a case of this kind which is very often cited. The opinion held that under the statute, common to most of the States, both the land and the debt were to be treated as personal property in the hands of the executor, and that he could dispose of it as if it had been personal estate pledged, but that the statute related only to local and not to foreign executors and administrators. It then goes on to say that after foreclosure the land becomes the principal thing, because the debt is then extinguished to the extent of the value of the land, and that an administrator who is appointed in the State could not convey real estate, except as provided by statute.

The harmony of these positions is not clearly apparent, but from other parts of the opinion, and from the cases cited, the real ground of the decision seems to be that, as a suit for foreclosure or a writ of entry may be necessary to enforce the right under the mortgage, a foreign administrator cannot give a right which he cannot exercise himself. This seems also to have been one of the grounds of decision in *Kerr v. Moon*, 6 Wheat. 565. In *Reynolds v. McMullen*, 55 Mich. 568, and in *Sloan v. Frothingham*, 65 Ala. 593, the disability of a foreign administrator was based upon statutory provisions. However applicable this rule may be to mortgages which require proceedings for foreclosure, it is to be noted that the modern form of mortgage, with a power of sale, brings in a new and distinct point to be considered. This point is whether the executor or administrator, acting not strictly in his official capacity as the representative of the deceased mortgagee, but rather as *persona designata*, and so as the appointee of the mortgagor, may not exercise the power by virtue of the contract between the parties. This question was early considered by Chancellor Kent in *Doolittle v. Lewis*, 7 Johns. Ch. 45, where it was held that the whole authority rested upon the convention of the parties and not upon the decision of any court; that the exercise of the power was a matter of contract and not of jurisdiction, since the authority to sell is derived from the power and not from the court of probate of another State. So in *Holcombe v. Richards*, 38 Minn. 38, and in *Hayes v. Frey*, 54 Wisc. 503, it was held that the power was contractual and might be exercised by a foreign executor or administrator. We think the reasoning of these cases is sound. Its adoption carries out the contract of the parties and violates no statute of the State. It prevents conflict of authority, for were an administrator appointed in this State, he might not be able to obtain from the administrator of the domicile of the deceased the evidence of the debt upon which the title under the mortgage must rest.

But it is urged that the mortgagor, upon payment of the debt, is entitled to have the mortgage discharged upon the record. Pub. Stat. R. I. cap. 176, §§ 6, 7, and that this cannot be enforced against a foreign administrator. Neither can it be enforced against a mortgagee who is out of the State; yet no one, on that account, would question his power to sell for a default. It is also urged that the records in this State will not show the appointment of the administrator, and so a purchaser cannot know whether he has the right to sell. There is some force in the objection, but the same trouble may be found in other cases. Suppose a living mortgagee assigns his mortgage, a purchaser must satisfy himself of the identity of the assignee as best he can. So with an executor as the agent of the mortgagor named in the power, the purchaser must satisfy himself of identity and consequent authority in the same way. The executor is simply the appointee in the mortgagor's power of attorney. He is the agent of the mortgagor in making the sale and applying the proceeds. He would naturally give, and would be bound to give, all reasonable information as to his agency,

and there seems to be no more real difficulty in finding out who is making the sale than in any case of a transfer, where the transferee is out of the State.

We are therefore of opinion that the sale by the respondent executor of the mortgagee was in this respect a valid sale, and the case will stand for trial upon the issues of fact.¹

¹ *Acc.* *Holcombe v. Richards*, 38 Minn. 38, 35 N. W. 714; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Waldo v. Milroy*, 19 Wash. 156, 52 Pac. 1012; *Hayes v. Frey*, 54 Wis. 503, 11 N. W. 695. *Contra* (by statute), *Sloan v. Frothingham*, 65 Ala. 593.

A foreign administrator cannot assign a mortgage without power of sale, so as to give his assignee an interest in the land. *Cutter v. Davenport*, 1 Pick. 81; *Dial v. Gary*, 14 S. C. 573. See *Heyward v. Williams*, 57 S. C. 235, 35 S. E. 503.

A "public administrator," not appointed by the Probate Court, but designated by statute to administer estates of deceased persons under certain circumstances, cannot execute the power of sale. *Reynolds v. McMullen*, 55 Mich. 568, 22 N. W. 41.

Where land in a foreign State is devised to an executor, he may maintain ejectment as owner without taking out letters in a foreign State. *Vaughn v. Northup*, 15 Pet. 1; *Chapman v. Headley* (Ky.), 4 S. W. 189. And when he is given by the will power to sell foreign land, he may exercise the power without taking out letters. *Green v. Alden*, 92 Me. 177, 42 Atl. 359; *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020; *Crusoe v. Butler*, 36 Miss. 150; *Newton v. Bronson*, 13 N. Y. 587.

Where the executors are named as trustees, with power of sale, it has been held that a trustee substituted by the court at the domicile of the testator may sell foreign land under the power. *Hoysradt v. Tionesta Gas Co.*, 194 Pa. 251, 45 Atl. 62. — *Ed.*

CHAPTER XIV.

THE ADMINISTRATION OF ESTATES.

SECTION I.

ESTATES OF DECEASED.

STEVENS v. GAYLORD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1814.

[*Reported 11 Massachusetts, 256.*]

JACKSON, J.¹ The determination of this cause depends on the sufficiency of the defendant's second plea in bar. In that plea he admits, in effect, that he was indebted to the intestate, as alleged in the declaration, and that the plaintiff is administrator, duly appointed in this State, of the effects of the deceased; but he alleges, in his defence, that before the plaintiff was so appointed administrator, he, the defendant, and one Philemon Gaylord, who were both inhabitants and residents in Connecticut, were duly, and according to the laws of Connecticut, appointed administrators of the effects of the said deceased, by a certain judge of probate there, who had the power of granting such administrations; that they gave bond to the said judge, with condition to exhibit an inventory, and to render their account to him; that they did accordingly exhibit an inventory of all the effects of the deceased, which had come to their knowledge, including therein all the moneys due from the defendant to the deceased on the notes and demands specified in the plaintiff's declaration; by means of all which the defendant is holden and obliged to account to the said judge of probate in Connecticut for all the said moneys.

The plaintiff assigns, as a special cause of his demurrer to this plea, that it is not alleged therein that the said Tibbals, at the time of his decease, or at any time before, resided or had his home in Connecticut; and, on examining the other parts of this record, it appears that such an averment was made in another plea; and being traversed, the issue was found for the plaintiff.

¹ Part of the opinion is omitted. — ED.

We are well satisfied that this point is wholly immaterial in the decision of this cause. The right of granting administration is not confined to the State or country in which the deceased last dwelt. It is very common, and often necessary, that administration be taken out elsewhere. If a foreigner, or a citizen of any other of the United States, dies, leaving debts and effects in this State, these can never be collected by an administrator appointed in the place of his domicile; and we uniformly grant administration to some person here for that purpose. This is the rule of the common law, and it is adopted, as we understand, in most of the United States. [Goodwin v. Jones, 3 Mass. Rep. 514; Dawes v. Boylston, 9 Mass. Rep. 337; Borden v. Borden, 5 Mass. Rep. 67; Langdon *et al.* v. Potter, 11 Mass. 313.]

In such case, however, the administration granted here is considered as merely ancillary to the principal administration, granted in the jurisdiction where the deceased dwelt. It is true that such ancillary administration is not usually granted until an administrator is appointed in the place of the deceased's domicile. But this cannot be a necessary prerequisite; for if so, and it should happen that administration is never granted in the foreign State, the debts due here, under such circumstances, to a deceased person could never be collected; and the debts due from him to citizens of this State might remain unpaid.

The time of granting the respective letters of administration is also immaterial in this case. The administrators in Connecticut, if duly appointed, must collect all the effects of the deceased in that State, whilst the plaintiff will do the like here; and the residue, after paying the debts of the deceased, wherever collected or remaining, must be distributed according to the laws of the State in which the deceased dwelt. If it should appear, upon due examination in our Probate Court, that Tibbals had his home in Connecticut, we should cause the balance remaining in the hands of the administrator here to be distributed according to the laws of Connecticut, or transmitted for distribution by the administrator in Connecticut, under the decree of the Probate Court there. And we cannot doubt that the courts in Connecticut would, under like circumstances, adopt the same principle of comity and justice. Ambler, 25; 2 Vesey, 35; 2 B. & P. 229, *in notis*; Bruce v. Bruce, 9 Mass. Rep. 337; Dawes, Judge, &c. v. Boylston; [Harvey v. Richards, 1 Mason, 381; Dawes v. Head, 3 Pick. 128, 2 Kent. 344; Decouché v. Savetier, 3 Johns. Ch. 310; Dixon v. Ramsay, 3 Cran. 319; United States v. Crosby, 7 Cran. 115; Bruce v. Bruce, 2 B. & P. 229.]

Having disposed of these two subordinate points, the great question in the cause still remains, — whether, if the debtor of an intestate be duly appointed administrator in another State, that circumstance, together with the others stated in this plea, furnishes a sufficient defence.¹ . . .

It was suggested in the argument, that the notes on which this action

¹ The learned judge held that the defence stated in the plea was a good one. — Ed.

is brought were in this State at the death of the intestate. This fact does not appear on the record; and, if material, it should have been pleaded. But if the notes were here, the debtor being a citizen of Connecticut, might be effectually discharged by a release from any administrator in Connecticut having lawful authority to receive the debt. And, further, the notes, under such circumstances, could never be recovered, in the ordinary course of things, without being sent to Connecticut, and demanded by an administrator duly appointed there.

The circumstance of the defendant's having come into this State, so as to expose himself to this action, cannot affect the general principle. The law would be the same if that contingency had not happened; in which case the debtor could never be compelled to pay but to an administrator duly authorized in Connecticut; and of course a release given to him by such an administrator would bar any subsequent action for the same debt.

Another reason why this money should be accounted for in Connecticut is, that all the effects of the deceased are liable, in the first instance, to his creditors there. No principle of comity requires of that government to lend their aid in collecting the effects of the deceased, and to send those effects out of their country, whilst any of their citizens have just and legal claims upon the fund. This debt, then, was assets, liable to the claims of all creditors, citizens of Connecticut, and they ought not to be deprived of this advantage merely because the debtor is himself appointed administrator. . . . *Defendant's plea good.*¹

FAY v. HAVEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[Reported 3 Metcalf, 109.]

DEBT on a probate bond, dated September 1, 1835, given by Thomas Haven, as principal, and the other defendants, as sureties, for the faithful performance by Haven of his duties as administrator of the estate of Samuel Livermore, late of New Orleans in the State of Louisiana.²

¹ The appointment of an ancillary administrator will not be made (in the absence of a statute requiring it) if it is not necessary for the proper distribution of the assets. Washburn's Estate, 45 Minn. 242, 47 N. W. 790. The principal administrator cannot demand the appointment. *In re Estate of Neubert*, 58 S. C. 469, 36 S. E. 908.

A testator may, however, name two executors, one to act in each of two States; and each will then have, in the State in which he is named to act, such right to act as any executor named. *Sherman v. Page*, 21 Hun, 65.

The cases, almost without exception, treat a foreign executor and administrator in the same way. The few cases which suggest a distinction, in some respects, between their powers probably do not represent the law. See, for instance, *Winchester v. Bank*, 2 G. & J. 80; *Grant v. Reese*, 94 N. C. 720. — ED.

² Statement of facts is omitted. — ED.

DEWEY, J. That this action may be maintained for such a breach of this bond as will authorize a judgment for nominal damages, seems to us to be very clear. The Rev. Sts. c. 68, § 25, authorize such action, "if any executor or administrator shall neglect to render and settle his accounts in the probate court within six months after the return made by the commissioners, or after the final liquidation of the demands of the creditors; or within such further time as the judge of probate shall allow therefor, so as to delay a decree of distribution." The facts stated in the case show such neglect of the administrator to render and settle his accounts within the time limited by the statute.

It was suggested by the defendants' counsel, that an executor or administrator is not liable to an action unless he has neglected to render and settle his account, after having been first cited by the judge of probate to render it. Such is the provision of c. 67, § 9, providing the remedy for neglect to render and settle the accounts of administrators in cases of solvent estates; but we think it does not apply to cases like the present, which seem to be specially provided for in c. 68, § 25, and where the mere neglect to render the account, within the period prescribed by the statute, subjects the administrator to a suit, without any previous citation from the judge of probate.

The question of more difficulty in the present case is that which arises upon the claim of the plaintiff, in behalf of the creditors in Massachusetts, to hold the defendant responsible upon this bond for certain property of said Livermore, deceased, which came into the hands of said Haven (the principal in this bond), in the State of Louisiana, by virtue of his appointment as one of the executors of said Livermore, and his subsequent appointment, by the court of probate there, as tutor to his children, who were legatees under the will.

By the facts stated by the parties, it appears, that Samuel Livermore had been for many years a resident in New Orleans, and had his domicile there at the time of his decease; that said Haven and one Ogden were constituted executors of his will and duly authorized to act, as such, under the laws of Louisiana, and that the property, for which it is now attempted to make the defendants chargeable, on the bond, to the plaintiff as judge of probate for the county of Middlesex, is the avails of certain personal and real estate, which came to the hands of said Haven in the State of Louisiana, under the authority of the Probate Court of New Orleans, received and held by him, either in the capacity of executor in Louisiana, or as a tutor legally constituted there, to hold the same for the benefit of his children, or to a small amount, held as payment of a legacy to his wife under the said will. No specific property of said Livermore is or has been in the hands of said Haven in this Commonwealth, except the valuable collection of books received by the corporation of Harvard College, by virtue of a specific bequest to them by Mr. Livermore (and which the executors transmitted from Louisiana), and certain real estate which was duly returned in the inventory taken here.

It is very obvious that the disposition of both the personal and real estate of Livermore, the avails of which came to the hands of Haven, was to be regulated by the Laws of Louisiana; personal estate being always to be disposed of according to the *lex domicilii*, and the real estate by the *lex loci rei sitæ*. Story's Conflict of Laws, 403, 404. The administration granted in Massachusetts was merely ancillary, and the only duty devolving upon such administrator would be to collect the assets here, and appropriate so much of the avails of the same to the payment of debts due to our citizens, as would be authorized by the general solvency or insolvency of the estate of the deceased, and remit the balance to the place of principal administration. *Davis v. Estey*, 8 Pick. 475. It has been, I apprehend, the uniform doctrine of this court, that any other administration than that granted where the deceased had his domicile must be considered as an ancillary administration. *Stevens v. Gaylord*, 11 Mass. 256. Such ancillary administrator would not be obliged to account here for assets received in the place of principal administration, although he had filed a copy of the will and taken letters of administration in this Commonwealth. *Selectmen of Boston v. Boylston*, 2 Mass. 384. *Campbell v. Sheldon*, 13 Pick. 23. But, contrary to this doctrine, it is now contended that the administrator may be required to account, at the place of the ancillary administration, for the property of the deceased which was found at the place of his domicile and principal administration, for the purpose of subjecting it to the payment of debts due to creditors in Massachusetts; and this too after the property has been changed in its specific character, and the proceeds thereof have been, by order of the Probate Court in Louisiana, vested in the defendant, Haven, in another and different capacity from that of executor.

The position, thus urged by the counsel for the plaintiff, seems, as already suggested, at variance with the principles which are recognized by the authorities already cited, as well as other cases that may be referred to. *Richards v. Dutch*, 8 Mass. 506; *Dawes v. Boylston*, 9 Mass. 337; *Jennison v. Hapgood*, 10 Pick. 78; *Vaughan v. Northup*, 15 Pet. 1.

The rule seems to have been very generally sanctioned, that as to the property in the hands of the executor or administrator, acquired without the jurisdiction of the principal administration, he is to be held accountable for its proper application only to the legal tribunals of the State in which the principal administration was taken.

The questions which have been sometimes raised, and which have been of more difficult solution, have been as to the authority of the ancillary administrator to retain and apply the property, received within his local jurisdiction, to the payment of debts or legacies due to creditors and legatees residing within that jurisdiction.

Some reliance was placed by the counsel for the plaintiff upon the decision of the Supreme Court of New York, in the case of *Campbell v. Tousey*, 7 Cow. 64, where it was held, that if a foreign executor, coming

into that State, without filing a copy of the will and taking an appointment under the authority there, should intermeddle with the goods of the deceased in New York, and thus make himself an executor *de son tort*, he should also be charged with the assets remaining in his hands, though received in a foreign country. This decision, as well as the general question of conflicting administrators, is considered by Mr. Justice Story, in his learned commentaries on the Conflict of Laws, 424-429. He doubts the correctness of the decision in *Campbell v. Tousey*, and says "there is great difficulty in supporting it, to the extent of making the foreign executor or administrator liable, in such State, for assets received abroad and brought into the State by him. It is not easy to perceive how he can be sued in such State for assets in his hands received abroad under the sanction of a foreign administration, and by the authority of the foreign government to which he is accountable for all such assets."

It seems to be highly reasonable and proper that the accountability of the administrator, for all assets received under an appointment in one State, should be exclusively under the laws and judicial decisions of the State conferring upon him the power and authority to act in this behalf; and that all questions as to the faithful or unfaithful discharge of his duties as such administrator should be limited to the same local jurisdiction. If it were not so, obviously great confusion would arise, and conflicting decisions might be made, requiring inconsistent duties of the administrator. Nor can we think that the omission in the statutes of Louisiana, of the requisition of bonds from the administrator for the faithful discharge of his trust, can vary the general principle. The nature and extent of the security to be given in such cases must necessarily be regulated by the local law. We are to presume that such laws are in force in Louisiana, as furnish reasonable security to the parties in interest, and that in some form, through the aid of legal process, the avails of the estate of one deceased may be reached, or the executor be restrained in any attempt to withdraw the same, or to place himself beyond the jurisdiction of her courts, while his liabilities to creditors are undischarged. Indeed the records of the court of probate of New Orleans, in this case, and the civil code of Louisiana, to which we have been referred, both show various proceedings in the cases of settlement of estates, having for their object the proper application of the assets to the payment of the debts of deceased persons. The remedy, it is true, may be lost by delay or laches of the creditor in enforcing his claim, and the proceedings may be closed in a shorter time than would be consonant with the laws of Massachusetts; but this cannot affect the general principle as to the liabilities of the foreign administrator in our courts.

Upon the whole matter, the court are of opinion that the defendants are not liable upon this bond to the judge of probate in this county, for any assets received in the State of Louisiana; the property thus received, having been already administered upon in that State. If the

settlement of the estate is not closed there, proceedings may be instituted there against the legal representatives to enforce any valid claims existing on behalf of creditors. If not enforced in due time, the creditors may have lost their remedy by their own laches.

The books in possession of Harvard College were transmitted to the donees from Louisiana, and the estate at the place of principal administration being solvent, they were properly transmitted by the executors, agreeably to the bequest of the testator; and this being a proper and legal disposition of them under the authority and laws of Louisiana, they are not assets to be accounted for by the administrator in this Commonwealth.

The administrator is not to be charged with the real estate returned in the inventory, or be made liable by reason of any neglect to procure license to sell the same; this court having, upon an application duly made by him for such license, refused to grant it. *Livermore v. Haven*, 23 Pick. 116. The result is, therefore, that the plaintiff is entitled to a judgment for only nominal damages.¹

ADAMS v. BATCHELDER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1899.

[*Reported 173 Massachusetts, 258.*]

HOLMES, J. This is an action of contract brought upon a New Hampshire judgment obtained by a man domiciled in New Hampshire, upon a debt contracted in New Hampshire, against a resident of Massachusetts. The judgment creditor died, and the present plaintiff, also a resident of New Hampshire, was appointed his administratrix there. On April 18, 1881, the plaintiff was appointed ancillary administratrix in Massachusetts. On January 21, 1891, the defendant received a discharge in insolvency in Massachusetts. At the trial there was evidence that the debt never had been paid, but the judge ruled that the discharge was a bar to the action. The case is here upon an exception to that ruling.

The ruling raises the question whether the debt is to be regarded as due to a person resident in Massachusetts, within the meaning of Pub.

¹ *Acc. Preston v. Melville*, 8 Cl. & F. 1; *Lewis v. Grognaud*, 17 N. J. Eq. 425; *Freeman's Appeal*, 68 Pa. 151; *Hamilton v. Carrington*, 41 S. C. 385, 19 S. E. 616 (but see *Cureton v. Mills*, 13 S. C. 409). Compare *Grant v. Reese*, 94 N. C. 720.

If without securing an appointment in another State an administrator takes assets there, it seems clear that he is accountable for the assets to the court which appointed him. *McPike v. McPike*, 111 Mo. 216, 20 S. W. 12. *Contra*, *Mothland v. Wireman*, 3 Pen. & W. 185. The sureties on his bond have also been held accountable for such assets. *Andrews v. Avory*, 14 Grat. 229. *Contra*, *Fletcher v. Sanders*, 7 Dana, 345 (sureties of an ancillary administrator).

Sts. c. 157, § 81. The defendant's position is that, as the debt could not be collected except by taking out ancillary administration here, it must be taken to be due to the plaintiff in her capacity of ancillary administratrix, and not as a natural person; and that, as that office has its birth and life in Massachusetts, the plaintiff in that capacity has her residence here, just as a corporation has its domicil in the State which created it. *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Mass. 154. But this argument is working a fiction too hard. An executor or administrator is not a corporation sole. He gets his title or his succession to the rights of the deceased by his appointment, it is true. Nowadays he holds those rights in a fiduciary capacity, and he must account for what he receives. But there is no absolute separation of his artificial from his natural personality, as is shown by the fact that a suit against an executor may end in a judgment *de bonis propriis*, either at common law or under Pub. Sts. c. 166, § 10, and very frequently may lead to a personal judgment for costs, as also that in general his contracts as such bind him only personally, even when he is entitled to indemnity from the estate. *Durkin v. Langley*, 167 Mass. 577. A judgment recovered by an administrator is payable to him personally, and may be sued on by him in another State. *Talmage v. Chapel*, 16 Mass. 71. And it has been held that, when a chattel is taken from an administrator wrongfully, he may sue for it in another State into which it has been carried. *Crawford v. Graves*, 15 La. Ann. 243. Story, *Conf. of Laws*, § 515. Dicey, *Conf. of Laws*, 459, 460. See *Commonwealth v. Griffith*, 2 Pick. 11, 18. What is true of an executor is even more plainly true of an ancillary administrator. And as one person can have but one domicil, unless the law for this purpose treats the woman and the ancillary administratrix as two persons, the plaintiff is a resident of New Hampshire, since no one would contend that her residence was changed for all purposes by her merely accepting an appointment here.

In the present case there is also another consideration. The debt was not suspended until the appointment of the ancillary administratrix. It was the property of the principal administratrix so far that a payment to her would have been a bar to the present action: *Wilkins v. Ellett*, 9 Wall. 740; s. c. 108 U. S. 256; see Story, *Conf. of Laws*, § 515, n.; Dicey, *Conf. of Laws*, 461; or that the debt could have been sued for and collected there before the ancillary letters were issued, and that, if collected in Massachusetts, it would be transmitted to New Hampshire and accounted for there, unless there happened to be local claims against the estate. We presume that the right to sue the debtor in New Hampshire, if service could be got there, was not affected by the ancillary appointment. As is said in *Wilkins v. Ellett*, 108 U. S. 256, 258, the objection to the principal administratrix's bringing an action here "does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him."

See *Hutchins v. State Bank*, 12 Met. 421, 425; *Anthony v. Anthony*, 161 Mass. 343, 351, 352; *Swift, C. J.*, in *Slocum v. Sanford*, 2 Conn. 533, 535.

Perhaps this branch of the argument so far is not unanswerable. But there is the further fact that the debt already had been reduced to judgment. Whatever may be the law as to simple contract debts, it was laid down three centuries ago, and still is repeated, that judgments are *bona notabilia* where the judgment was given. As applied to this case, at least, we may accept the statement. Sir John Needham's case, in note to *Daniel v. Luker*, Dyer, 305; *Kegg v. Horton*, 1 Lutw. 399, 401; *Gold v. Strode*, 3 Mod. 324; *Adams v. Savage*, Ld. Raym. 854; *Attorney-General v. Bouwens*, 4 M. & W. 171, 191; *Holcomb v. Phelps*, 16 Conn. 127, 135; 1 Wms. Saund. 274 a, n. 3. Taking all the elements into account, it seems to us that in this case, if ever, "the [administratrix] here is only the deputy or agent of the [administratrix] abroad." *Dawes v. Head*, 3 Pick. 128, 141, 142. See also *Merrill v. New England Ins. Co.*, 103 Mass. 245, 248.

Whichever of the foregoing lines of thought we pursue, we are led to the conclusion that the debt is not barred. If we treat the debt as due to the ancillary administratrix, we cannot so far distinguish between her natural and her artificial person, in the present state of the law, as to say that she resides in Massachusetts as administratrix when as a woman she resides in New Hampshire. If we are to consider the question of title more nicely, the debt belongs to the principal administratrix, although she may not receive it except subject to local debts of the estate.

Exceptions sustained.

STERN v. QUEEN.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1896.

[Reported [1896] 1 *Queen's Bench*, 211.]

THIS was a petition of right brought by the suppliants, executors of Baron Herman de Stern, for a return of the sum of £8,187, being the amount of probate duty paid upon certain shares in American railway companies, the certificates for which shares were in England at the testator's death.¹

WRIGHT, J. In this matter the case finds that the certificates, the value of which is in question in this petition of right, were documents of title held by the shareholders in certain foreign companies, which certificates certify that the person therein named is entitled to the number of shares named, and so forth. Upon every certificate there is

¹ This short statement is substituted for that of the Reporter. Arguments of counsel are omitted. — Ed.

indorsed a form of transfer and a power of attorney in blank. Then paragraph 8 repeats with regard to this case most of the judicial statements of fact or inferences of fact which were drawn in the House of Lords in the case of *Colonial Bank v. Cady*, 15 App. Cas. 267. I think that the true inference to be drawn from the statements made in the case is that the duty has properly been claimed and paid upon these documents. It is not a matter that is susceptible of any lengthened statement; but the way I put it is this. There is in this country within the jurisdiction of the Ordinary (now the Probate Court) a document the existence of which vouches and is necessary for vouching the title of some one to the foreign share, so that in the absence of that document no one at all could establish a title to the share. It is found by the case that the certificates are currently marketable here as securities for that share and the dividends payable on that share; it is found, in fact, that the delivery of the certificate in this country *ipso facto* affects the title in a sense that it entitles the transferee to all the transferor's rights. It follows that the certificate itself has some operative power here, and it seems to me not to be within the ancient rule that a simple contract debt or mere evidences of a simple contract debt are supposed to exist only at the place of the debtor's residence. It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value in the hands of the executors within the jurisdiction of the Ordinary. Therefore I think that the Crown is entitled to succeed.

KENNEDY, J. I agree, and for the same reasons.

Judgment accordingly.

PINNEY v. MCGREGORY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[Reported 102 Massachusetts, 186.]

CONTRACT by the plaintiff as administrator of the estate of Rufus G. Pinney, late of Stafford in the State of Connecticut, upon several promissory notes made by the defendants, payable to the order of the intestate and overdue. *The notes were found in Connecticut after the death of the intestate. The plaintiff was appointed administrator by the probate court for the county of Hampden in this Commonwealth. One of the defendants was a resident of the county at the time administration was granted, but not at the death of the intestate. The judge at the trial ruled that no action could be maintained by the plaintiff because the probate court had no jurisdiction; and directed a verdict for the defendants. If this ruling was correct, judgment was to be entered

upon the verdict, otherwise the verdict to be set aside and judgment entered for the plaintiff.¹

GRAY, J. . . . We prefer to rest the jurisdiction of the Probate Court upon the residence of a debtor to the intestate in this county at the time of the grant of administration.

By the law of England, simple contract debts due to the deceased are *bona notabilia* in the diocese where the debtor resides.² It is said indeed in the text-books of approved authority, that the debtor must have resided there at the time of the intestate's death, though we do not find that this has been expressly adjudged. 1 Williams on Executors, 279, and authorities cited. The canons of 1 James I. (1603) upon the subject, however, speak of the deceased being "at the time of his death" possessed of goods and chattels or good debts in any other diocese or peculiar jurisdiction than that in which he died. *Ib.* 267, 268. But it is observable that, in the leading cases in the courts of common law, in which the administration granted in one county was declared void, the allegation was that the debtor resided in another county not only at the time of his death, but also ever since, or at the time of the grant of administration. *Yeomans v. Bradshaw*, Carth. 373; s. c. 3 Salk. 70, 164, 12 Mod. 107, Comb. 392, Holt, 42; *Hilliard v. Cox*, 1 Salk. 37; s. c. 2 Salk. 747, 1 Ld. Raym. 562, 3 Ld. Raym. 313. And in the case of *Yockney v. Foyster*, cited and ap-

¹ This short statement is substituted for that of the Reporter. Only so much of the opinion is given as deals with the subject of jurisdiction based on residence of the defendants. — ED.

² A simple contract debt is assets where the debtor resides: *Arnold v. Arnold*, 62 Ga. 627; *Burbank v. Payne*, 17 La. Ann. 15; *Emery v. Hildreth*, 2 Gray, 228; *Sayre v. Helme*, 61 Pa. 299; and this, though a bill or note has been given for the amount of it: *Yeoman v. Bradshaw*, Carth. 373, 3 Salk. 70; *Wyman v. Halstead*, 109 U. S. 654; *Slocum v. Sanford*, 2 Conn. 533; *Chapman v. Fish*, 6 Hill 554; but see *McNamara v. McNamara*, 62 Ga. 200; *Thorman v. Broderick*, 52 La. Ann. 1298, 27 So. 735; *Goodlett v. Anderson*, 7 Lea, 289. So of a judgment debt. *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125; *Swancy v. Scott*, 9 Humph. 327; see *Du Val v. Marshall*, 30 Ark. 230. So of a claim to a share of the profits of a partnership. *Shaw's Estate*, 81 Me. 207, 16 Atl. 662 (*semble*); *Jones v. Warren*, 70 Miss. 227, 14 So. 25. So of a right to recover damages. *Hartford & N. H. R. R. v. Andrews*, 36 Conn. 213; *Missouri Pacific R. R. v. Lewis*, 24 Neb. 848; *contra*, *Jeffersonville R. R. v. Swayne*, 26 Ind. 477; *Perry v. S. J. & W. R. R.*, 29 Kan. 420.

A bond, on the other hand, is assets where it is found. *Daniel v. Luker*, Dyer, 305; *Barclift v. Treece*, 77 Ala. 528; *Beers v. Shannon*, 73 N. Y. 292; and see *Grant v. Rogers*, 94 N. C. 755. In *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61, it was held that notes and bonds found within a State were not "property in this State" within the meaning of a statute. See *Speed v. Kelly*, 59 Miss. 47.

Shares of stock in a corporation are usually held to be assets where the stock-books are kept. *Attorney-General v. New York Breweries Co.*, [1898] 1 Q. B. 205; *Grayson v. Robertson*, 122 Ala. 330, 25 So. 229; *Arnold v. Arnold*, 62 Ga. 627; *Washburn's Estate*, 45 Minn. 242, 47 N. W. 790 (*semble*). In *Russell v. Hooker*, 67 Conn. 24, 34 Atl. 711, they were held to be assets at the domicile of the deceased, where they were found.

In *Epping v. Robinson*, 21 Fla. 36, bills and notes and written contracts were held *bona notabilia* where found. — ED.

proved by Sir John Nicholl in *Scarth v. Bishop of London*, 1 Hagg. Eccl. 636, 637, in which the only effects within the province were brought there after the death of the party, Sir William Wynne held that, if the court of chancery had held a grant of probate there to be necessary in order to file a bill in equity to recover the property, the ecclesiastical court "in aid of justice" might grant letters of administration.

Our statute declares that "the Probate Court for each county shall have jurisdiction of the probate of wills, granting administration of the estates of persons who at the time of their decease were inhabitants of or resident in the county, and of persons who die without the State, leaving estates to be administered within such county." Gen. Sts. c. 117, § 2. It does not in terms say "leaving estate in such county at the time of their decease." The section embodies the Rev. Sts. c. 64, § 3, and c. 83, § 5, which were substantial re-enactments of the St. of 1817, c. 190, §§ 1, 16. In *Picquet, Appellant*, 5 Pick. 65, the court held that the earliest of these statutes should receive a liberal construction to enable the representatives of deceased foreign creditors to collect the debts of the deceased here in the only way in which by our laws they could be recovered, that is to say, through the power of administration granted by the laws of this Commonwealth; and that a debt due from a citizen of this Commonwealth to a foreign subject at the time of his death should therefore be deemed estate left by him in this Commonwealth, within the meaning of that statute. The same rule of construction must be applied to this case.

Indeed the St. of 1817, c. 190, § 16 (which included the estates of intestates already deceased, as well as of those who might die in the future), would seem to point to the time of a petition for administration rather than the time of the death, as the time at which there must be estate within the county, in order to give jurisdiction; for the words are, "when any person who has died or shall die intestate without the Commonwealth shall leave estate of any description within the same to be administered," letters of administration may be applied for as if he had died within the Commonwealth, and the judge of probate of any county "wherein such estate shall be found" shall have power to grant them. But it is not necessary to rely upon so narrow an argument.

Before that statute, the probate courts of the Commonwealth exercised the jurisdiction of granting administration on property belonging or debts due to persons residing abroad, in order to enable them to be collected in this State, because without such appointment no suit could be brought in our courts for the assets or debts of the deceased, either in the courts of the Commonwealth or of the United States. *Goodwin v. Jones*, 3 Mass. 514; *Stevens v. Gaylord*, 11 Mass. 256; *Picquet v. Swan*, 3 Mason, 469; *Noonan v. Bradley*, 9 Wall. 394. In *Dawes v. Boylston*, 9 Mass. 337, and *Wheelock v. Pierce*, 6 Cush. 288, it seems to have been assumed that a debtor or goods of the intestate coming or being brought into the Commonwealth after the death of the testator would give jurisdiction to support an administration. The

dictum of Mr. Justice Bigelow in *Bowdoin v. Holland*, 10 Cush. 18, that "it is undoubtedly true that if the deceased had at the time of his death neither domicile nor assets within the Commonwealth, the judge of probate had no jurisdiction in the premises," is not to be taken in its strictest sense. It was there held that *prima facie* evidence that a deceased nonresident had conveyed real estate in this Commonwealth in fraud of his creditors was sufficient to warrant the grant of administration here, even if no similar grant had been made in the State of his domicile; and the question asked by the learned judge upon that point is equally applicable to this. "If the will is never proved in the place of the testator's domicile, and is purposely withheld from probate, have creditors in this State no means of procuring administration on their deceased debtor's estate, and thereby reaching his property here?" To limit the power of granting administration to cases in which the goods are or the debtor resides in the Commonwealth at the time of the death of the intestate would be to deny to the creditors and representatives of the deceased, whether citizens of this or of another State, all remedy whenever goods are brought into this State, or a debtor takes up his residence here, after the death of the intestate. The more liberal construction of the statute is necessary to prevent a failure of justice.¹

WILKINS v. ELLETT.

SUPREME COURT OF THE UNITED STATES. 1883.

[Reported 108 *United States*, 256.]

GRAY, J. This is an action of assumpsit on the common counts, brought in the Circuit Court of the United States for the Western District of Tennessee. The plaintiff is a citizen of Virginia, and sues as administrator, appointed in Tennessee, of the estate of Thomas N. Quarles. The defendant is a citizen of Tennessee, and surviving partner of the firm of F. H. Clark & Company. The answer sets up that Quarles was a citizen of Alabama at the time of his death; that the sum sued for has been paid to William Goodloe, appointed his administrator in that State, and has been inventoried and accounted for by him upon a

¹ *Acc. Saunders v. Weston*, 74 Me. 85; *Low v. Horner*, 10 Hawaii, 531. So administration may be granted upon chattels brought into the State, whether rightfully or wrongfully, after the death of the owner. *Stearns v. Wright*, 51 N. H. 600; *In re Hughes*, 95 N. Y. 55; *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125 (*semble*); *Green v. Rugely*, 23 Tex. 539. *Contra*, *Embry v. Millar*, 1 A. K. Marsh, 300.

But where the property is taken into the foreign State by an agent of the domiciliary administrator for a temporary purpose, as for sale or transmission, the State into which it is taken can exercise no control over it as against the domiciliary administrator. *Crescent City Ice Co. v. Stafford*, 3 Woods 94, Fed. Cas. 3387; *Wells v. Miller*, 45 Ill. 382; *In re Schley's Estate*, 11 Phila. 139. This is clearly true where the goods are returned or sold before an ancillary administrator is appointed. *Christy v. Vest*, 36 Ia. 285; *Martin v. Gage*, 147 Mass. 204, 17 N. E. 310. — Ed.

final settlement of his administration; and that there are no creditors of Quarles in Tennessee. The undisputed facts, appearing by the bill of exceptions, are as follows:—

Quarles was born at Richmond, Virginia, in 1835. In 1839 his mother, a widow,*removed with him, her only child, to Courtland, Alabama. They lived there together until 1856, and she made her home there until her death in 1864. In 1856 he went to Memphis, Tennessee, and there entered the employment of F. H. Clark & Company, and continued in their employ as a clerk, making no investments himself, but leaving his surplus earnings on interest in their hands, until January, 1866, when he went to the house of a cousin in Courtland, Alabama, and while there died by an accident, leaving personal estate in Alabama. On the 27th of January, 1866, Goodloe took out letters of administration in Alabama, and in February, 1866, went to Memphis, and there, upon exhibiting his letters of administration, received from the defendant the sum of money due to Quarles, amounting to \$3,455.22 (which is the same for which this suit is brought), and included it in his inventory, and in his final account, which was allowed by the Probate Court in Alabama. There were no debts due from Quarles in Tennessee. All his next of kin resided in Virginia or in Alabama; and no administration was taken out on his estate in Tennessee until June, 1866, when letters of administration were there issued to the plaintiff.

There was conflicting evidence upon the question whether the domicile of Quarles at the time of his death was in Alabama or in Tennessee. The jury found that it was in Tennessee, under instructions, the correctness of which we are not prepared to affirm, but need not consider, because assuming them to be correct, we are of opinion that the court erred in instructing the jury that, if the domicile was in Tennessee, they must find for the plaintiff; and in refusing to instruct them, as requested by the defendant, that the payment to the Alabama administrator before the appointment of one in Tennessee, and there being no Tennessee creditors, was a valid discharge of the defendant, without reference to the domicile.

There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicile at the time of his death; that the proper place for the principal administration of his estate is that domicile; that administration may also be taken out in any place in which he leaves personal property; and that no suit for the recovery of a debt due to him at the time of his death can be brought by an administrator as such in any State in which he has not taken out administration.

But the reason for this last rule is the protection of the rights of citizens of the State in which the suit is brought; and the objection does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him.

If a debtor, residing in another State, comes into the State in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere. If the debtor being in that State, is there sued by the administrator, and judgment recovered against him, the administrator may bring suit in his own name upon that judgment in the State where the debtor resides. *Talmage v. Chapel*, 16 Mass. 71; *Biddle v. Wilkins*, 1 Pet. 686.

The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer, and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose in action to sue in his own name. *Harper v. Butler*, 2 Pet. 239; *Shaw, C. J.*, in *Rand v. Hubbard*, 4 Met. 252, 258-260; *Petersen v. Chemical Bank*, 32 N. Y. 21. And on a note made to the intestate, payable to bearer, an administrator appointed in one State may sue in his own name in another State. *Barrett v. Barrett*, 8 Greenl. 353; *Robinson v. Crandall*, 9 Wend. 425.

In accordance with these views, it was held by this court, when this case was before it after a former trial, at which the domicil of the intestate appeared to have been in Alabama, that the payment in Tennessee to the Alabama administrator was good as against the administrator afterwards appointed in Tennessee. *Wilkins v. Ellett*, 9 Wall. 740.

The fact that the domicil of the intestate has now been found by the jury to be in Tennessee does not appear to us to make any difference. There are neither creditors nor next of kin in Tennessee. The Alabama administrator has inventoried and accounted for the amount of this debt in Alabama. The distribution among the next of kin, whether made in Alabama or in Tennessee, must be according to the law of the domicil; and it has not been suggested that there is any difference between the laws of the two States in that regard.

The judgment must therefore be reversed, and the case remanded with directions to set aside the verdict and to order a *New trial*.¹

¹ *Acc. Selleck v. Rusco*, 46 Conn. 370; *Citizens' Nat. Bank v. Sharp*, 53 Md. 521; *Dexter v. Berge*, 76 Minn. 216, 78 N. W. 1111; *Riley v. Moseley*, 44 Miss. 37; *Parsons v. Lyman*, 20 N. Y. 103; *Gray's Appeal*, 116 Pa. 256; 11 Atl. 66. *Contra*, *Vaughn v. Barret*, 5 Vt. 333. As against later claims of domestic creditors such payment is not a good discharge. *Ferguson v. Morris*, 67 Ala. 389.

But where an English company transferred shares of an American testator to his executor, the latter was held *executor de son tort* and liable to probate duty in England. *Attorney-General v. New York Breweries Co.*, [1898] 1 Q. B. 205. *Contra*, *Citizens' Nat. Bank v. Sharp*, 53 Md. 521. And where a foreign administrator took assets, he was held in an early case as *executor de son tort* in favor of the creditors. *Riley v. Riley*, 3 Day 74. See *Hopkins v. Town*, 4 B. Mon. 124. — ED.

SHAKESPEARE v. FIDELITY INSURANCE, TRUST & SAFE
DEPOSIT CO.

SUPREME COURT OF PENNSYLVANIA. 1881.

[Reported 97 Pennsylvania, 173.]

THIS was an action of trover by the administrator *de bonis non, cum testamento annexo* of the estate of John B. Ackley deceased, against The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, for certain United States coupon bonds deposited with the defendants by the testator in his lifetime for safe-keeping on special certificate of deposit which by its terms must be surrendered upon withdrawal of the deposit. The testator left the certificate, at his death, in New Jersey, his domicile, and it was presented by the New Jersey executor to the defendant, and the bonds surrendered in exchange for it. The plaintiff having been appointed administrator in Pennsylvania, demanded the bonds, and upon refusal brought this suit. The court entered judgment for the defendant upon the point reserved, viz., Is the plaintiff entitled to recover upon these facts? The plaintiff took a writ of error.¹

SHARSWOOD, C. J. We do not consider that the United States coupon bonds which are the subjects of this controversy were, at the time of the death of the decedent, any part of his estate in this Commonwealth. The defendants were the mere depositaries of the bonds for safe-keeping. They were, therefore, in the possession of the decedent. He held the certificate of their deposit. The defendants were bound to restore the bonds at any time to the lawful holder of the certificate. It was as if the bonds had been placed in a fire-proof of the defendants, of which the decedent possessed the key. In point of fact, the certificate was in the actual possession of the widow of the decedent in New Jersey. She surrendered it as she was bound to do, to the foreign executor. She could not have withheld it. The New Jersey executor could have sued her, and compelled its delivery to him. The Pennsylvania administrator certainly could not. By the terms of the certificate it might be transferred by assignment indorsed thereon and approved by the company. The foreign executor could have so assigned it, and his assignee could have sued for the delivery of the bonds, in his own name. The assignment would have been a sale of the bonds, which were payable to bearer, and passed by delivery. Whoever showed a legal title to the certificate had a right to the possession of the bonds. The case, then, is within the principle of *Moore v. Fields*, 6 Wright, 471, where it was held that, where a debt fixed by a decree or judgment of the court of

¹ This short statement is substituted for that of the Reporter. Part of the opinion, in which the statute fixing the powers of foreign executors was held not to apply, is omitted. — Ed.

another State in favor of a foreign administrator, is due by citizens of Pennsylvania to the estate of a decedent, the administrator of the foreign domicile may sue for and recover it in his own name.

*Judgment affirmed.*¹

AMSDEN v. DANIELSON.

SUPREME COURT OF RHODE ISLAND. 1895.

[Reported 18 *Rhode Island*, 787.]

STINESS, J. The plaintiff, executor of the will of Lucretia C. Danielson, late of Providence, deceased, sues the defendant, a resident of Killingly, Connecticut, upon a promissory note, made by him, dated at said Killingly, and payable to the testatrix. The action was commenced January 12, 1894, by an attachment of real estate of the defendant in the city of Providence in this State. It appears by the defendant's plea that after said will was probated here, and since the commencement of this suit, a copy of the will was recorded in Killingly and William H. Chollar was appointed administrator, who has qualified, and to whom the defendant has made payment of the amount due on the note. To this the plaintiff replies that there was no property in Connecticut except a trifling amount of furniture, which had been fully administered by him before the application to record the will in Killingly; that there were no creditors in Connecticut; that the defendant, knowing the intention of the plaintiff to bring suit here, induced the plaintiff to forbear his suit by promising to pay the debt on a certain day, and thereupon, contriving to prevent said attachment and to evade the payment of the note, took advantage of the plaintiff's forbearance and procured the recording of the will and the appointment of Chollar as administrator in Connecticut; that the note is and has been, since the death of the testatrix, in the plaintiff's possession, upon which the defendant paid him the sum of \$234.20 in October, 1893, and that the defendant had notice of the attachment before he made the payment to Chollar as administrator. The defendant demurs to the replications.

The main question raised by the pleadings is whether under these circumstances the suit can be maintained in Rhode Island, after the payment to the administrator in Connecticut. We think it can be maintained. First the fact is set up that this was a voluntary and collusive payment, which upon demurrer must be taken to be true. While a party will be protected from paying a second time that which he has once in good faith been compelled to pay, it is clear that these facts do

¹ In *McCully v. Cooper*, 114 Cal. 253, 46 Pac. 82, where a foreign administrator having a certificate of deposit demanded payment and was refused, it was held to be his duty to surrender the certificate to the domestic administrator, that the latter might sue upon it. — ED.

not make such a case. A person cannot oust the court of one State of jurisdiction by a collusive judgment, and much less by a voluntary payment, in another. So it has been held that where a man, by wilful default, has suffered judgment to go against him as garnishee, in another State, when he might have prevented it, a payment is no bar in the State where a suit upon the claim had been previously commenced. *Whipple v. Robbins*, 97 Mass. 107; *Wilkinson v. Hall*, 6 Gray, 568. See also *Hull v. Blake*, 13 Mass. 153, 157, and *Stevens v. Gaylord*, 11 Mass. 256.

Passing over the question whether the promise of the defendant made a new cause of action, about which there seems to be little room for doubt, we come, second, to the main question which has been argued, viz., whether the executor in Rhode Island can sue at all for the amount due upon the note. The argument is that the note was payable in Killingly, the domicil of the defendant, and hence its proceeds were assets in Connecticut and not in Rhode Island. This argument is sustained by *Pinney v. McGregory*, 102 Mass. 186; *Abbott v. Coburn*, 28 Vt. 663; and *Wyman v. Halstead*, 109 U. S. 654. Admitting that the note was payable in Killingly, the fact does not control this case. If it were necessary to bring suit upon it in Connecticut of course an administrator would be appointed there. But it does not follow that it cannot be collected elsewhere. The plaintiff having the note, and finding property of the defendant in this State, had as much right to proceed to collect it here, as though it had been his own debt. It would be a most absurd rule of law which would require him to go to another State, record the will, secure the appointment of an administrator and go through all the requirements of a probate court in order to bring a suit where possibly there might be no property, when he could attach property here and secure his judgment without trouble. The cases cited by the defendant do not hold this. *Slocum v. Sanford*, 2 Conn. 533, appears to have been a case where the defendant, in 1813, had proved his claim against the estate of the payee, before insolvent commissioners in Rhode Island, from which the amount of the note sued upon had been deducted and the administrator in Rhode Island had given him a discharge from it before the suit was brought in Connecticut, but certainly before the trial in 1816, wherein this fact was held to be a good defence. Undoubtedly the *bona fide* settlement of a debt with a foreign administrator is a bar. In *Stevens v. Gaylord*, 11 Mass. 256, the defendant had been appointed administrator in Connecticut before an administrator had been appointed and suit brought in Massachusetts. It is indeed held in both these cases that the debt was assets in the State where the debtor resided, and this is the point to which they are cited. But that is not the question before us. Assuming this to be so, the question is whether the administrator may collect the debt in another State if he has the chance to do so. Upon this question we have no doubt. It is well settled that a *bona fide* voluntary payment to a foreign administrator is a good discharge of a

debt: *Mackay v. Saint Mary's Church*, 15 R. I. 121; and if this be so, an involuntary judgment, based upon an attachment of property, cannot be less valid. As said by Wells, J., in *Merrill v. New England Ins. Co.*, 103 Mass. 245, 248: "Having possession of, and a legal title to, the instrument, or evidence of the demand, and finding the debtor or his property within the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached." The same doctrine was announced in *Perkins v. Stone*, 18 Conn. 270, 274, where debtors resident in Massachusetts were sued by an administrator in Connecticut. "Had it been necessary for the plaintiff to go into the State of Massachusetts to bring his action, it is conceded that he must have taken out letters there, to enable him to sue in his representative capacity. But as he is under no necessity of invoking the aid of the courts of that State, his case is not brought within the operation of the rule which precludes an administrator appointed in one State from suing in the courts of another." The case which comes most closely to opposing these cases is that of *Pond v. Makepeace*, 2 Met. 114. There, a Rhode Island administrator had brought suit in Massachusetts and obtained judgment by default, under which execution was levied on real estate, and it was sold in satisfaction of the judgment. It was held that the suit was no bar to a subsequent suit by a Massachusetts administrator, because the Rhode Island administrator had no power to sue in that State and so could pass no title to the real estate under the levy and sale. But that is not like this case. Here, the plaintiff is suing in Rhode Island, the State in which he holds his letters testamentary.

We see no reason why he may not so sue. The cases we have quoted from sustain the right and we know of none which deny it. The reason upon which the right is based is satisfactory and we therefore decide that the plaintiff has that right under the pleadings in this case.

The demurrers of the defendant in the plaintiff's replications are overruled.¹

¹ In spite of the doctrine that the existence of a promissory note given for a debt does not alter the situs of the debt, which is assets, for purpose of administration, at the domicil of the debtor, the courts appear to uphold a payment only to such administrator as can produce the note. Thus: 1. Payment to the administrator of the maker's State, without surrender of the note, is not a legal discharge as against the domiciliary administrator who has the note. *McCord v. Thompson*, 92 Ind. 565; *Amsden v. Danielson*, 19 R. I. 533, 35 Atl. 70 (affirming the decision above after withdrawal of the demurrer and rejoinder filed denying collusion); *St. John v. Hodges*, 9 Baxt. 334. See *Bull v. Fuller*, 78 Ia. 20, 42 N. W. 572, where payment to a domiciliary administrator without surrender of the note was upheld against the ancillary administrator with the note, on the ground that no creditor of the estate was interested, and "to compel a second payment, and require the debtor to seek repayment from the administrator in Vermont, when the money is already in the hands of a representative of the estate, merely in the interest of a double administration would indeed be a burlesque upon the administration of justice."

2. Payment to the domiciliary administrator who has not the note is not a legal

MERRILL v. NEW ENGLAND MUTUAL LIFE
INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[Reported 103 *Massachusetts*, 245.]

CONTRACT by the plaintiff as administrator of the estate of Howard M. Merrill, on a policy of insurance issued by the defendants upon the life of the intestate. The answer alleged that the defendants had been sued on the policy in Illinois by the administrator of Merrill appointed in that State. Merrill was domiciled in Illinois; the policy was pledged by him to the plaintiff as security for a loan which had not been paid. The defendant was a Massachusetts corporation.¹

WELLS, J. There can be no doubt that the appointment of the administrator in Massachusetts was legal and proper. A debt due to the intestate from any party having a domicile in this State, or any demand or right, requiring legal authority for its enforcement, is sufficient to give jurisdiction for such an appointment. Gen. Sts. c. 117, § 2; *Pinney v. McGregory*, 102 Mass. 186; *Picquet*, Appellant, 5 Pick. 65; *Emery v. Hildreth*, 2 Gray, 228. Such administration is auxiliary only, when the domicile of the intestate was elsewhere at the time of his decease, if there is an administrator at the place of domicile. It extends to all assets found within the State; and, within the jurisdiction where granted, it is exclusive of all other authority. The administrator appointed at the place of domicile of the deceased is the principal administrator; and personal securities, in the possession and control of the intestate at the time of his decease, vest in him. He can do no legal act for their collection in another jurisdiction, without an ancillary appointment there. And, if another has already been appointed auxiliary administrator, the collection can be made, within that jurisdiction, only through him. But the principal administrator may always dispose of or collect such securities, if he can do so without being obliged to resort to the domicile of the debtor. *Hutchins v. State Bank*, 12 Met. 421. Having possession of, and a legal title to, the instrument, or evidence of the demand, and finding the debtor or his property within

discharge as against the administrator of the maker's State who has the note. *Young v. O'Neal*, 3 Sneed, 55; and see *Riley v. Moseley*, 44 Miss. 37.

3. Payment to the domiciliary administrator who holds and surrenders the note is a good bar to a suit previously brought by the administrator of the maker's State who has not the note. *Thorman v. Broderick*, 52 La. Ann. 1298, 27 So. 735; *Goodlett v. Anderson*, 7 Lea, 286. See *McIlvoy v. Alsop*, 45 Miss. 365, where the administrator of the maker's State was allowed to foreclose a lien upon land in that State given to secure the payment of the note, though the note was in the hands of the foreign domiciliary administrator who refused to surrender it. — ED.

¹ This short statement of facts is substituted for that of the Reporter. Arguments of counsel are omitted. — ED.

the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached.

The appointment by the insurance company of a general agent, with authority to accept, in behalf of the principal, service of legal process in Illinois, subjects the defendant to the suit brought by the principal administrator in the courts of that State. *Gillespie v. Commercial Insurance Co.*, 12 Gray, 201. As that suit was first brought, and apparently embraces the whole cause of action, so that a judgment therein would merge all liabilities of the defendant upon the policy, we should be inclined to hold that it was exclusive of any other remedy, so that no action could be prosecuted in any other court upon the same contract at the same time, if the administrator in Illinois had then had the legal title and possession of the policy, or the absolute right of possession. *Whipple v. Robbins*, 97 Mass. 107; *Newell v. Newton*, 10 Pick. 470; *Wallace v. McConnell*, 13 Pet. 136; *Embree v. Hanna*, 5 Johns. 101; *American Bank v. Rollins*, 99 Mass. 313.

It is said by Mr. Justice Dewey in *Colt v. Partridge*, 7 Met. 574, that "whether a plea in abatement that another action between the same parties, and for the same cause, is pending in another State, is good, has not been decided here." It is also said by Mr. Justice Foster in *American Bank v. Rollins*, that the doctrine of that case and of *Wallace v. McConnell*, *Embree v. Hanna*, and *Whipple v. Robbins*, "constitutes an important exception to the ordinary rule that *lis pendens* in a foreign court is not a good plea."

The present case does not depend upon the ordinary rule in regard to *lis pendens*; nor is it within the exception to that rule, if the decisions, above referred to, do constitute an exception. The administrator in Illinois and the administrator in Massachusetts are not the same party. They are not even in privity with each other. *Low v. Bartlett*, 8 Allen, 259; *Ela v. Edwards*, 13 Allen, 48. The authority and right of each is independent and exclusive within the jurisdiction of his own appointment. If, therefore, the policy had been in the legal custody and control of the principal administrator, the institution of proceedings for the collection of its proceeds by him, in the courts of Illinois, and jurisdiction of the defendant or its property obtained thereon, would have been such an appropriation of the claim as a part of the assets of the estate subject to administration there, as would have excluded the ancillary administration from any authority over it.

But, upon the facts stated, we are satisfied that the intestate had parted with the possession of the policy, upon a valuable and legal consideration, in his lifetime; so that, at his decease, he had no right of possession, and none passed to his administrator, except subject to such rights as had been conferred by the pledge and delivery of the policy by the intestate to his uncle Thomas T. Merrill. The agreed statement shows a distinct and unequivocal pledge of the policy to

secure the intestate's note for seven hundred dollars, given for money lent to him by Thomas T. Merrill upon the assurance and condition that it should be so secured. The policy was delivered in pursuance of that agreement, and remained in the possession of Thomas T. Merrill until he was appointed administrator. This was sufficient to constitute a good pledge of the instrument, giving to the pledgee an equitable interest in the proceeds of it. Angell on Insurance, §§ 327-340; *Palmer v. Merrill*, 6 Cush. 282; *Dunn v. Snell*, 15 Mass. 481; *Currier v. Howard*, 14 Gray, 511.

In that state of facts, if the principal administrator had himself received the ancillary appointment in Massachusetts, he could not have reclaimed the policy from the hands of Thomas T. Merrill without payment of the note in redemption of the pledge. It is unnecessary to consider now, whether, beyond this, the claim of the parents of the intestate would be protected against the general interests of the estate. It is sufficient that there was a right of possession in Thomas T. Merrill, superior to that of the intestate or his administrator, and which he might pass over to the administrator in Massachusetts upon such terms as he saw fit, consistent with his limited rights. His interest in the policy is not a mere order for a part of the proceeds, but extends to the whole policy alike. With his concurrence the auxiliary administrator may maintain a suit and collect the proceeds of the policy. Without it neither he nor the principal administrator could control the possession or collect the proceeds. The pledge makes it no longer a question of jurisdiction, as affected by priority of suit, comity between the States, or otherwise, but one merely of the right of the respective parties claiming an interest in the policy. The right of the plaintiff in this suit is superior to that of the principal administrator in Illinois, because he represents the equitable interest and right of immediate possession and control of the pledgee, as well as the legal capacity to sue, which remains in the representatives of the estate of Howard M. Merrill. That legal right to sue is held by the administrators of Howard M. Merrill, wherever appointed, in trust for the benefit of the equitable assignee of the claim. The assignee is entitled to control any suit brought for its recovery. His right would be protected by the courts against any attempt of the administrators to collect or release the demand in disregard of his interests. *Jones v. Witter*, 13 Mass. 304; *Eastman v. Wright*, 6 Pick. 316; *Grover v. Grover*, 24 Pick 261; *Rockwood v. Brown*, 1 Gray, 261; *Bates v. Kempton*, 7 Gray, 382. Upon the same principle, it would be equally protected against prejudice from any attempt to anticipate him by means of a suit instituted by such administrator in his own behalf and without recognition of the rights of the assignee. Within the same jurisdiction, the respective rights of the assignor and assignee may be readily adjusted, and suits controlled. The difficulty arises from the existence of suits in separate and independent jurisdictions. There is a class of decisions, referred to by the defendant, particularly affecting questions of jurisdiction between

the federal and State courts, to the effect that a subject-matter once brought within the jurisdiction of a court of general jurisdiction, whether by suit *in personam* or proceeding *in rem*, or even by process of attachment, is in the custody of that court, and cannot be withdrawn or controlled by any process or proceeding of any other court. But that doctrine is explained and narrowly limited by Mr. Justice Miller in *Buck v. Colbath*, 3 Wall. 334. It does not apply to this case, for reasons already indicated; because the policy, having been pledged and delivered to another in the lifetime of the intestate, was never in the legal possession of his administrator in Illinois, and therefore was never properly brought within the jurisdiction of the courts in that State, either as assets subject to administration, or as a cause of action which the administrator there could maintain. He could not, by commencing a suit there, transfer to those courts the determination of the rights of the pledgee, so as to compel him to seek them by intervening in such suit. The pledgee had an independent title, accompanied by possession of the policy; and by bill in equity in his own name, or by suit in the name of the administrator, in Massachusetts, could enforce his claim. Neither the administrator in Massachusetts nor the administrator in Illinois would be allowed to defeat the prosecution of such a suit. Against either administrator, seeking to collect the amount of the policy by other proceedings or means, the insurance company have a sufficient defence. That defence stands not merely upon the jurisdiction and judgment of the court, but equally well upon the title of the pledgee, yielded to by the insurance company without suit¹ . . .

Upon the agreed statement, being satisfied that the plaintiff, as administrator of the intestate's estate in Massachusetts, and representing also the equitable interest and possessory right of the pledgee of the policy, is entitled to its control and collection, in preference to the principal administrator in Illinois, we feel bound to render judgment accordingly for the amount due from the defendant by the terms of the policy.

*Judgment for the plaintiff.*²

SULZ v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

COURT OF APPEALS, NEW YORK. 1895.

[Reported 145 *New York*, 563.]

PECKHAM, J. This is an appeal by the defendant from a judgment in favor of the plaintiff for the amount of a certain policy of insurance

¹ Part of the opinion, in which the effect of the assignment is discussed, is omitted.
— Ed.

² But see *Steele v. Conn.*, Gen. L. I. Co., 31 App. Div. 389, 52 N. Y. Supp. 373 (affirmed 160 N. Y. 703). A New York man whose life was insured in a Connecticut company pledged his policy to the company in Connecticut and died. His administrator in New York brought suit; then the company voluntarily paid the Connecticut administrator. This payment was held no bar to the New York suit.— Ed.

for \$3,000 issued by the defendant, an insurance company organized under chapter 175 of the Laws of 1883. The policy of insurance, or certificate of membership, as it is sometimes called, was issued by the defendant association January 20, 1891, to Charles H. Sulz, payable to his "legal representatives," at the home office of the company, in the city of New York, within ninety days, after satisfactory evidence of the death of the insured party. The application for membership and for a policy of insurance in the corporation defendant was made by the insured, Charles H. Sulz, in December, 1890. In such application, in answer to the requirement to state the name of the beneficiary in full, he answered, "my estate." Mr. Sulz, at the time of the issuing of the policy to him (Jan. 20, 1891), was at San Francisco in California, and upon its receipt he sent it to his wife at their residence in the city of Brooklyn, to which city he soon returned, and it remained in the possession of the wife for about six months, when, on the removal of the family (the husband and wife) from one house to another in the city of Brooklyn, the wife packed it in a trunk, which was taken by the deceased when he started on his journey to Tacoma in the State of Washington. When the deceased went to Tacoma in 1891, he left his wife at his old home in the city of Brooklyn. In August, 1891, he wrote from the city of Tacoma to the home office of the defendant in the city of New York notifying them that he had made Tacoma, Washington, his home for the future, having gone into the manufacture of soaps and chemicals there, and he asked them to forward assessments to him at Tacoma, or to notify him who their agent was there, to whom he might make further payments. In January, 1892, Mr. Sulz died at Tacoma, having at the time this policy or certificate in his possession. At the time of his death his wife was still residing in Brooklyn. Letters of administration were applied for by his widow to the surrogate of Kings County and were granted, and she duly qualified and entered upon the discharge of her duties as administratrix. A few days after the granting of such letters, she signed a written renunciation of her right to take out letters as administratrix in Tacoma, and forwarded it to the former attorneys of her husband at that place, and thereupon one R. P. Thomas was appointed administrator of the estate of her husband by the proper court in the State of Washington. Mr. Thomas at once commenced an action in that State to recover upon the policy of insurance which he had taken possession of as part of the effects of the deceased, and such suit was commenced by the service of process upon an agent of the defendant residing in the State of Washington and duly authorized under the laws of that State, and by the designation of the defendant corporation to receive such service on its behalf. Within a few days subsequent to the commencement of that action, the plaintiff herein commenced this action, as administratrix of the estate of her deceased husband, in the Supreme Court of this State, to recover the amount due under such policy of insurance. The defendant set up a defence to this action based upon an alleged breach of

warranty by the insured in making false answers to certain questions contained in the application for insurance signed by him. It also set up the above facts in relation to the insurance policy and the pendency of the action against it in the Superior Court of the State of Washington, and claimed that the plaintiff herein had no right to maintain this action because of these facts. The case was tried at Circuit, and the facts relating to the alleged breach of warranty submitted to a jury, and upon the whole case the jury found a verdict for the plaintiff, and the question is whether the judgment entered upon that verdict shall stand.

We will assume that the letters of administration granted to the plaintiff by the surrogate of Kings County are conclusive in regard to the status of the plaintiff as being the administratrix duly appointed upon the estate of her deceased husband, and the only question remaining is whether as such administratrix, and upon the facts in this case, she can maintain this action. We are of the opinion that the courts of this State ought not to take jurisdiction of this action. The defendant issued what it terms in the blank application provided by it a "certificate of membership or policy of insurance," by which certificate or policy it insured the life of Mr. Sulz for \$3,000 for the benefit of his "legal representatives," those words being used in the instrument instead of the words "my estate," as used by the insured himself in his application for the insurance. The constitution and by-laws of the company, and the certificate or insurance policy itself, must all be looked at for the purpose of discovering what was the contract entered into by the parties. *In re Equitable Reserve, &c. Ass'n.*, 131 N. Y. 354-368. In some companies, possibly in this, a person might become a member thereof, and his family or any other named beneficiary be entitled to receive the benefit of such membership upon his death, as provided for in the constitution or by-laws, even where no certificates of membership or policy of insurance had been issued; but where such a paper has been issued by the company and delivered to and accepted by the insured person, it must be read in connection with such constitution and by-laws for the purpose of determining what the contract was which existed between the parties at the time of the death of the insured. The policy in this case was in the possession of the deceased at the time of his death in the State of Washington, and I do not think that it differs materially from any other policy of insurance so far as this question is concerned. Having been issued, it has become a material part of the contract between the parties to it.

The case of *Holyoke v. Union Mutual Life Ins. Co.*, 22 Hun, 75, is cited by the defendant, and is somewhat in point. In that case the plaintiff, as executrix of George E. Holyoke, brought an action in this State against the insurance company (a New York corporation) for the purpose of recovering the amount of a paid-up policy issued upon the life of one Alfred S. Perkins, a resident of the State of Maine, and by him assigned to Holyoke. The plaintiff's testator died in Brooklyn,

N. Y., May 7, 1875, where he had continuously resided for sixteen years prior to his death, and he left a will by which he bequeathed and devised his whole property to his wife, the plaintiff, which will was duly admitted to probate in Kings County, and on June 8, 1875, letters of administration were issued to the plaintiff. After the death of Mr. Holyoke, the assignment was found among his effects at his office in the city of New York and was delivered to the plaintiff, and had been in her possession up to the commencement of the action. On October 8, 1878, Alfred S. Perkins, the insured person, died, and the plaintiff immediately gave proper proofs of his death and otherwise duly performed all the conditions required of her by the policy and demanded its payment. The defence interposed was that the assignment in question was a collateral assignment only to secure Perkins's indebtedness to Holyoke, and that the amount due the latter had been paid, and that letters of administration, with the will annexed, upon the estate of Holyoke had been issued to one Percival Bonney by the Probate Court of Cumberland County, Maine, and that the policy of insurance was in the State of Maine at the time of Holyoke's death, and had been by Bonney assigned to and was then held and owned by another person residing in the State of Maine. The court held that at the time of the death of George Holyoke the legal title to the policy in controversy was vested in him; that he held a written assignment of the policy, and that in contemplation of law it was in his possession. The policy was, however, as matter of fact, in the State of Maine when the testator died, and was taken possession of by the administrator of his goods, etc., with the will annexed, who had been appointed by the Probate Court in the latter State. The court said it was immaterial whether the assignment to Holyoke by Perkins was as collateral security for the debt due from the latter to Holyoke or whether it was an absolute one. If collateral, the debt was due from Perkins himself; and he being a resident of Maine, no one could enforce payment of the debt in the courts of Maine, or release or control the same, save an administrator appointed in that State; and that if the assignment were absolute, the policy of insurance is the thing which formed a part of the property of the testator; that the assignment was only a muniment of title to that property, and must follow the thing assigned. It was stated that if the testator had left a chattel in Maine which remained in that State until after his death, it was clear that the chattel would belong to the administrator in Maine as against the administrator in New York, although the bill of sale transferring the chattel to the testator was found among his papers in New York, because administration of the property of the deceased person can be had only in the jurisdiction where the property is found after the death of such person, and the fact that the property in controversy is a chose in action makes no difference in the rule of law on this subject. Upon appeal to this court, the decision of the General Term was affirmed upon the opinion delivered by the court below (84 N. Y. 648). There are some expres-

sions in the opinion delivered in the Supreme Court in this Holyoke case which we might doubt the correctness of. While the decision itself upon the facts appearing in the report was proper, we do not think that the mere fact that a policy of insurance is found on the person of an individual dying in another State, but who was a resident of this State at the time of his death, would preclude the maintenance of an action by an administrator appointed here upon the policy in the courts of this State against a company residing here, although the policy remained in the other State. A simple contract debt (and such is a policy of insurance) is assets where the debtor resides, even though evidenced by a written instrument. *Wyman v. Halstead*, 109 U. S. 654; *Insurance Co. v. Woodworth*, 111 U. S. 138; *Chapman v. Fish*, 6 Hill, 554.

The case of *Morrison, Public Administrator, v. Mutual Life Ins. Co.*, 57 Hun, 97, is something like the Holyoke case, and it was held by the General Term, first department, that the administrator in New York could not enforce the payment of a policy of insurance issued by a company incorporated in this State to a resident of the State of Maine, where the policy had never thereafter been within the State of New York, even though the principal office of the company was in the city of New York. It was stated that the policy in question not having been in the State could not, under the principle of the Holyoke case, form any part of the assets of the deceased to which the plaintiff, an administrator appointed in the city of New York, acquired title. That case does not seem to have been brought to this court.

The facts in the case of *New England Life Insurance Co. v. Woodworth* (cited *supra*) are as follows: The husband of the insured commenced an action against the insurance company in the State of Illinois, although the party insured (his wife) died in the State of New York, and the insurance company was organized under the laws of the State of Massachusetts, and it was only after the death of the wife that the husband came into Illinois having the insurance policy in his possession. The United States Supreme Court held that a company may be regarded as present in and an inhabitant of the State where it has an agent upon whom, pursuant to the laws of that State, process may be served, and that an administrator is duly appointed in such State when the policy is brought within the State prior to such appointment, although the person insured died outside the limits of the State and not a citizen thereof. As the company is to be regarded as an inhabitant of the State where its agent is thus served with process, the court held that the principle that a simple contract debt followed the person of the debtor was not invaded, because the debtor was present in the State of Illinois when the suit was commenced by the husband as his wife's administrator, being at the same time the beneficiary under the policy. Under such facts the policy was assets in the State where it was when the administrator was appointed.

In this case the fact is the same; that is, the State of Washington

had enacted a law providing for the designation of an agent by a foreign company, upon whom process could be served for it, and the company had duly appointed such an agent, and process was properly served upon him in the action by the Washington administrator upon the insurance policy in question.

Within the above case in the federal court, the person of the debtor in this case was within the State of Washington, and the debt could be collected there as well as here. It is a case, therefore, of a concurrent jurisdiction, so far as the general facts go; and in such case the situs of the policy, the death of the insured in Washington, and the issuing of letters of administration in that State, and the prior commencement of the Washington action, are material facts. In this case we do not assert that the courts of this State might not have had jurisdiction to entertain this action, even though the policy were in the State of Washington, provided the courts of that State had not appointed an administrator, and the administrator thus appointed had not commenced an action on the policy prior to the action in this State. On the contrary, we are inclined to the opinion that jurisdiction of this action would in such event be entertained by the courts here. But in the case of administrators duly appointed in each State, when the foreign administrator first duly commences an action by the service of process upon an agent of the company to recover on the policy, and the policy is found in the foreign State at the death of the assured in that State, we think the courts of the foreign State have obtained jurisdiction, and therefore could give a full and complete discharge to the company if it paid upon a judgment obtained in such action, and we ought not to permit a second action in the courts of this State upon the same policy. In such a case as this we think that the principle of comity between the States calls for the refusal on the part of the courts of this State to entertain jurisdiction.

It is claimed, however, that the plaintiff might recover in this action under another aspect and in her own right, irrespective of her character of administratrix.¹ . . .

The judgment in this action ought not to stand, and it must therefore be reversed; and as the plaintiff cannot in any event succeed upon a new trial, her complaint should be dismissed, with costs out of the estate.

All concur, except O'BRIEN, J., not sitting.

*Judgment accordingly.*²

¹ The court held this contention unfounded. — ED.

² It is generally held that any administrator having possession of the policy may sue the company if he can get jurisdiction of it, and that any subsequent suit by another administrator is thereby barred. *New York Life Insurance Co. v. Smith*, 67 Fed. 694; *Equitable Life Ass. Soc. v. Vogel*, 76 Ala. 441; *Shields v. U. C. L. I. Co.*, 119 N. C. 380, 25 S. E. 951. *Contra*, *Ellis v. Ins. Co.*, 100 Tenn. 177, 43 S. W. 766. And see *Moise v. Life Assoc.*, 45 La. Ann. 736.

So, generally, any administrator may sue a debtor to the estate found within the

GOODALL v. MARSHALL.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1840.

[*Reported 11 New Hampshire, 88.*]

ASSUMPSIT, founded upon a promissory note, made by Alzo Rich, the defendant's intestate, payable to Jeremiah Jordan, or order, and indorsed.

Rich, the intestate, had his domicile in Vermont, and upon his decease administration was taken upon his estate in that government. Having left property in this State, an ancillary administration was taken here, and the defendant appointed administrator.

Prior to the decease of Rich the plaintiff had commenced an action against him in this State, founded upon this note, which was pending at the time of his decease.

The estate was represented insolvent in Vermont, and also in this State, and the plaintiff presented his claim, for allowance by the commissioners, in both States.

The commissioners in Vermont allowed the claim, and the administrators there excepted to the allowance, and filed their exceptions in writing in the Probate Court. Whereupon the plaintiff appealed to the County Court there, according to the law of that State, and the action there is still pending in that court.

The claim was also allowed by the commissioner in this State; and the defendant, having objected to the allowance, the plaintiff prosecuted his claim by entering this action in the common pleas, in pursuance of the statute.

The defendant moved the court to dismiss the action, alleging and offering to prove, that John Dewey, a citizen of Vermont, was the real owner of the note; and he contended that it could not be presented or prosecuted against the estate except in Vermont; and that if the plaintiff was the owner, the claim having been presented and prosecuted in Vermont, it could not be allowed in this State also.

The plaintiff denied that Dewey had any interest in the note, and contended that it was a valid claim against the estate, in this State and also in Vermont; and the questions arising upon the motion were reserved for the consideration of this court.

PARKER, C. J. The principal questions presented by this case have not been settled by any direct judicial decision here; and involving, as they oftentimes do, a conflict of laws, they have elicited some differences of opinion elsewhere.

When an individual dies possessed of estate in different governments, it seems to be settled, as a general rule, that his personal property, jurisdiction; and recovery will bar subsequent action in any jurisdiction. *Perkins v. Stone*, 18 Conn. 270; *Saunders v. Weston*, 74 Me. 85. See *Wyman v. Halstead*, 109 U. S. 654. — ED.

or movable estate, is to be distributed among his heirs or legatees according to the laws of the place in which he had his domicile at the time of his decease. 2 Kent's Com. 344, Lec. 37.

But the executor or administrator appointed in that place cannot, by virtue of that appointment, prosecute suits in any other State or foreign government, or claim to be recognized there as a representative of the deceased; nor can he be made answerable, as such, in any State other than that in which he has received letters of administration, or done acts which may subject him to liability as executor *de son tort*. *Sabin v. Gilman*, 1 N. H. Rep. 193; *Thompson v. Wilson*, 2 N. H. Rep. 291; *Morrill v. Dickey*, 1 Johns. Ch. Rep. 153, and cases cited; *Doolittle v. Lewis*, 7 Johns. Ch. Rep. 45; *Story's Conf. of Laws*, 422.

It becomes necessary, therefore, in order to the due collection and disposition of the personal property which may be left in any other government than that of the domicile, that an administration should be granted in pursuance of the laws of such government; and this is called an ancillary, or auxiliary administration.

That the proper office of such an administration is to collect the debts due the deceased in that jurisdiction, convert the personal property into money, and upon a settlement of the administration account, to transmit the balance found in the hands of the administrator, if so directed, to the place of the domicile, is generally admitted.

That the administrator has, generally, no power to dispose of the real property, unless the estate proves insolvent, is also clear. Under what circumstances he may obtain a license, and sell for the payment of debts, must depend upon the conclusions to be drawn respecting the relation which the ancillary administration bears to the principal administration, and respecting the rights of the creditors to demand payment of an ancillary administrator, or to have their claims allowed against the estate in his hands.

This is a subject of some practical difficulty. Whether the ancillary administration is to be made an instrument for the payment of the debts, or any part of them, and if the latter, of what part, has been a subject of considerable discussion.

If the general principle, that personal property follows the law of the place where the owner has his domicile, and is to be disposed of and distributed according to that law, was to be applied, without exception, in the administration and settlement of estates, it would seem to be the proper office of an ancillary administration to convert the property into money, and, after deducting the charges and expenses, to transmit all the residue to the place of the principal or original administration, to be distributed by the courts of that jurisdiction, according to its laws, leaving the creditors, heirs, and legatees to pursue their remedy in that forum. The law of the domicile could most readily and correctly be administered in its own tribunals, and the property, when converted into money, could easily be transmitted there.

But it has been thought that this course would impose an unnecc-

essary hardship upon creditors who were citizens of the government where the ancillary administration existed; and it seems to be generally settled that the debts due to such citizens should be paid by the ancillary administrator—the surplus only being transmitted to the place of the principal administration—and that in case of insolvency the assets in his hands are to be distributed among them. *Vide* 2 Kent's Com., Lec. 37; Story's Conf. 422; Dawes v. Head, 3 Pick. R. 145.

Some opinions exclude all other creditors from having their debts allowed and paid in the place of the ancillary administration. *Hunt v. Fay*, 7 Verm. R. 183, — Mr. Justice Mattocks *dissenting*. The point of the decision in that case, however, was, that the claim of the creditor was barred by a neglect to present it in this State, under the principal administration; which also was not the unanimous opinion of the court. And see *Davis v. Estey*, 8 Pick. 475.

It is apparent, that so far as creditors are permitted to prosecute their claims against the ancillary administrator, or the property in his hands, an exception must be made to the application of the law of the domicile of the late owner. If the debts are provided for in the place of the ancillary administration, the mode of payment under that administration must be regulated by the *lex loci rei sitæ*. In the case of immovable property, the claimant, or heir, whether he derives his title through an intestacy, or as devisee under a will, can take only according to that law. Story's Conf. 419. And in the case of insolvency, the creditors can reach the real property for the satisfaction of their debts only through the instrumentality of the same law.

With respect to movable property, as the title to it is subject to be modified, controlled, and limited by every nation, as it may think proper, with reference to its own institutions, and its own policy, and the rights of its own subjects, and as no nation is under any obligation of comity to enforce foreign laws prejudicial to its own rights, or those of its own subjects (Story's Conf. 421), it follows, that so far as an administration is had of the property in any particular government it must be according to the *lex loci*. This is uniformly, and it may be said necessarily, so in the granting of the administration, the collection of the debts due the estate, the conversion of the property into money, and the settlement of the account of administration. No nation or State is believed, in these particulars, to act with reference to the foreign law of the domicile of the deceased. Thus far the proceedings are analogous to laws regulating the remedy; or it may, perhaps, with more propriety be said that those proceedings, so far as they look to the payment of debts, are proceedings to enforce the remedy.

And the same law must govern the distribution of the assets in the payment of debts. If there be any conflict in the laws of the two places, the government which provides for and sustains the ancillary administration, if it retains the assets for distribution among those of its own citizens who are creditors of the estate, will of course provide

for their payment according to its own laws. There can be no reason, thus far, for the intervention, or administration, of any foreign law. Had those creditors pursued the property within their own government, in the lifetime of their debtor, it must have been according to the law of that government, excluding any preferences, or rules for distribution, prescribed by the *lex domicilii*; and the same application of the law may well continue after the decease.

Nor do we see any reason why a different rule of payment or distribution should be adopted, if the creditors of other States or nations are permitted to come with their claims, and to seek satisfaction out of the funds in the hands of the ancillary administrator. If the law of the domicile recognized and provided for preferences of one class of creditors over another; as, for instance, if by that law the creditors by specialty were first to be paid, while the *lex loci* required the payment of all creditors equally; the courts of the place of the ancillary administration could not be required, upon any principle of comity, to administer the foreign law, and to provide for such preferences, to the prejudice of their own citizens, claiming under their own laws. Nor could they be asked to administer the foreign law among their own citizens, by giving a preference of payment to those of them who were creditors by specialty. This conclusion seems to be sustained by the general current of authorities in this country. Story's Conf. 439, and cases cited.

The ancillary administration, therefore, operating only upon the property within that jurisdiction, is, throughout its whole proceedings, so far as creditors are concerned, to be governed by the law of the place. The property which is subjected to it, notwithstanding it is movable, no longer follows the law of the late domicile of its former possessor, except in regard to the balance which may be in the hands of the ancillary administrator, after the payment of the debts; and this will be subjected to the law of that domicile, either by being transmitted to the place of the domicile; or, if special circumstances require it, by a decree of distribution, according to that law, in the forum of the ancillary administration. It seems to be settled that this latter course is within the discretion of the court. *Harvey v. Richards*, 1 Mason's R. 408; 2 Kent's Com., Lec. 37; *Stevens v. Gaylord*, 11 Mass. R. 256; *Dawes v. Head*, 3 Pick. R. 144; *Heirs of Porter v. Heydock*, 6 Verm. R. 374; *Heydock's Appeal*, 7 N. H. Rep. 503. See also 8 Mass. R. 506, 9 Mass. R. 337.

This shows, very conclusively, that the position assumed in *Dawes v. Head*, 3 Pick. 141, that the ancillary administrator "is only the deputy, or agent, of the executor abroad," must be received with very great qualification at least. He receives his authority, not from the executor, but under a different law. He administers the estate which comes to his hands, up to the final settlement, under a different, and perhaps conflicting, law from that under which the executor acts; and he is in no way subject to the orders of the executor in the per-

formance of his duties. He may, it is true, be answerable to him through the operation of the administration bond, for the balance; and perhaps for mal-administration; and there may be a privity between them to a certain extent, but the consideration of that is not important at the present time.

As the movable property must be administered according to the *lex loci rei sitæ*, until it comes to the disposition of the balance in the hands of the administrator, is there any sound reason why a distinction should be made between creditors, citizens of that place, and those who reside in other governments? Or, in other words, shall the government which administers the property within its jurisdiction, and causes that administration to enure for the benefit of its own citizens, exclude the citizens of other States from a participation in it, by refusing to entertain their claims?

The first answer to this question may be drawn from a consideration of the state of the law relating to the remedies of the creditors, preceding the death of their debtor. It would perhaps be too much to say, that there is no nation, possessing just claims to be regarded as a civilized government, in which, during a time of peace and friendly relations, the subjects or citizens of a foreign State are excluded from pursuing similar remedies for the collection of debts to those provided for its own subjects. It is sufficient that no such exclusion is known to the common law, nor to the statutes of England or those of the several United States. So far as regards the relations of the latter to each other, any attempt at such exclusion is prohibited by the clause of the Constitution of the United States which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. If the creditors of the domicile may pursue the property of the debtor in his lifetime, in another government, equally with the citizens of the government where the property is situated, no sound reason suggests itself why they should be debarred of a remedy, and the property be appropriated exclusively, or in the first place, to the satisfaction of the creditors in the latter government, on his decease. Even if by permitting them to come in, the property may be insufficient to pay all, and the creditors in the government where the property is situated be thereby compelled to resort to the principal administration, where the debtor had his domicile, or to lose their debts, or a portion of them, this result is no other than might have been attained in the lifetime of the debtor, by his withdrawal of the property from their jurisdiction.

Another answer, and one which seems entitled to weight, is furnished by the considerations to which we have before averted, showing that the ancillary administration, so far as creditors are concerned, is to be governed by the *lex loci*. If no regard is had to the place of residence of the deceased, in the marshalling of the assets, and the payment of the debts, no good reason occurs to us why any regard should be had to the place of residence of the creditors, in the allowance of the claims.

And besides, it is not quite clear, in cases of actual insolvency, where there is sufficient personal property in the hands of the ancillary administrator to pay the debts due there, that the other creditors can reach the real estate, if any, in that place, except by presenting their claims there, and having them allowed, in due course, on a representation of insolvency. By the law of this State, lands are charged with the payment of debts, and an execution issuing against the goods and estate of a person deceased, in the hands of his executor or administrator, may be extended upon lands which were of the deceased. *Mead v. Harvey*, 2 N. H. Rep. 341. And the administrator may sell the lands, under a license, for the payment of debts, if they are necessary for that purpose, whether the estate be solvent or insolvent. N. H. Laws, 365. But if there is sufficient personal estate here to pay all the demands against the estate which may be prosecuted or allowed here, it may admit of question whether license can be granted, on a representation that the estate is insolvent under the administration of the place of the domicile. If the ancillary administrator has sold real estate, he may be required to pay over any balance of the proceeds remaining in his hands to the principal administrator or to account for such balance himself, in the settlement of his accounts in the place of the domicile, if he happen to be administrator there also. *Jennison v. Hapgood*, 6 Vermont R. 374, 7 N. H. Rep. 496; 10 Pick. R. 78; *Judge of Probate v. Heydock*, 8 N. H. Rep. 494.

And furthermore, the creditors, where the ancillary administration exists, are not bound to present or prove their claims in that place, but may rely upon their remedy in the place of the domicile alone, if they so elect.

For these reasons we are of opinion that where a person, domiciled in another government, dies, leaving property in this State, and an ancillary administration is taken here, and the estate represented insolvent, all the creditors of the deceased are entitled to prove their claims against the estate here, and to have it appropriated in satisfaction of their demands.

We are aware that the result, thus attained, will not place the rights of the creditors, in a state where an ancillary administration exists, precisely on the same footing on which they might have stood, with reference to the other creditors, had their debtor in his lifetime been declared a bankrupt in the place of his domicile. In that case the established law of the United States seems to be, that the creditors of the place, other than that of the domicile, may resort to the property there without regard to proceedings in bankruptcy; and that they may appropriate it, or so much of it as is necessary, to the payment of their debts. *Saunders v. Williams*, 5 N. H. Rep. 213, and cases cited.

The propriety of this American rule, as it has been called, authorizing the foreign creditors, in the case of bankruptcy, to appropriate the property to the payment of their debts, according to the *lex loci*, instead of

sending it to the place of the domicile, to be there distributed under the proceedings in bankruptcy, has been strongly impugned by Mr. Chancellor Kent and Mr. Justice Story, although they admit it to be the settled rule and policy here. If their views are correct, and if the disposition of the movable property situate in a foreign government, on the decease of the owner, ought to be founded on similar principles, then the result would seem to be that no debts should be paid through the agency of the ancillary administration; but that all the proceeds, after deducting the expenses of the administration itself, should be transmitted to the place of the principal administration, and all the creditors be compelled to resort thither for their satisfaction. But a universal consent to this, as the rule, is not to be expected; the authorities having already settled, that the creditors, where the property exists, shall not be compelled to resort to the place of the principal administration.

It is true that the rule just adverted to, allowing the creditors of the place where the property is situated to appropriate it, so far as is necessary, to the payment of their debts, in cases of bankruptcy, might be applied, through the agency of an ancillary administration, to the satisfaction of the same class of creditors, and to the exclusion of others, after the decease of their debtor. But although it is very desirable that rules regulating the rights of creditors should be simple and uniform, so far as may be, and that analogous cases should be governed by rules having as great an analogy to each other as the cases they govern have to one another, still we think there are sound reasons why this rule, which thus prevails in bankruptcy, should not be applied to the settlement of estates, even if the estates be in fact insolvent. In the first place the rule itself, which, in bankruptcy, permits the creditors in a foreign government to seize upon the property there (although it has much of policy to justify it, in the protection it gives to the citizens of the government in which the property is found, and from which it must be carried in order to be distributed under the bankruptcy), would not commend itself to an enlightened jurisprudence, which could protect and provide for the interests of all the creditors. There are several reasons why this rule may be justified, as one of policy, in the existing state of things. The property so situated would have been liable to the satisfaction of creditors there, through the agency of their own tribunals, in the lifetime of their debtor — the tribunals of the country where it is situated cannot administer the law under which the debtor is declared bankrupt or insolvent; nor is provision usually, if ever, made for auxiliary proceedings in insolvency — the creditors, in the government of the domicile, may well be bound by the law which their own legislature, or lawgiver, has provided for them; and not be permitted to resort to foreign tribunals, to obtain preferences in cases where their own laws have declared that the proceedings of their debtor ought to be arrested, and his property divided among his creditors. It is only by these,

and other reasons of a similar character, that the rule in cases of bankruptcy can be made entirely satisfactory, if even these can make it so.

But some of these reasons have little if any application in cases where the debtor is dead, and where the laws of the several States in which his property is situated provide for the collection of the assets by an administration, and also for the payment of the debts. Especially, it cannot be said, in such cases, that the creditors of the place of the domicile ought to be bound to the action of their own tribunals, and not permitted to go abroad and avail themselves of another administration for the purpose of obtaining satisfaction.

The next question is, whether the fact that the plaintiff has presented his claim in Vermont, and that proceedings are now pending there for its allowance against the estate, under the principal administration, can avail to defeat the claim here.

The mere pendency of a suit in that State would have been no bar to an action brought here, against the intestate, in his lifetime. *Brown v. Joy*, 9 Johns. R. 221; *Weeks v. Pearson*, 5 N. H. Rep. 325. And there is as little reason why the mere pendency of proceedings against his estate, in another State, should form a bar to the allowance of his claim against the estate in this jurisdiction.

But we do not place our decision upon this ground alone. The considerations already suggested indicate our opinion, that where an estate is represented insolvent, all the creditors may pursue their claims, and have them allowed, in every government where administration is taken, for the purpose of availing themselves of all the estate of their debtor, until they have obtained payment of their debts.

In the view we have thus taken of the matter, it is wholly immaterial whether the plaintiff is the absolute owner of the demand, or whether he holds it in trust for Dewey, as alleged by the administrator.

A final adjudication upon the mode and manner of distributing the assets, where there is more than one administration, and an actual insolvency, is not necessarily involved in this case, except that it follows as a consequence from the principles stated, that there is to be a distribution among the creditors who prove their claims, under the ancillary administration. That the court there cannot distribute directly to any creditors except those who present their claims, in due course, for settlement, is very clear. Whether, in making this distribution, regard is to be had to any other claims, seems not to be fully settled. In *Dawes v. Head*, before referred to, an opinion is expressed that the proper course is to make a *pro rata* distribution among the creditors, citizens of that State, having regard to all the assets in the hands of the principal, as well as in those of the ancillary administrator; and having regard also to the whole debts, which by the laws of either country are payable out of those assets, "disregarding any fanciful preferences which may be given to one species of debt over another," &c. It is further said, "the administrator here should be held to show the con-

dition of the estate abroad, the amount of property subject to debts, and the amount of debts, and a distribution could be made upon perfectly fair and equitable principles." In *Davis v. Estey*, 8 Pick. R. 475, the principle was directed to be applied, in the satisfaction of a judgment rendered.

Cases may exist in which this will prove a perfectly satisfactory rule, and accomplish an equal distribution, among all legally entitled. But in other cases there may be great difficulty in its application. It holds the ancillary administrator to furnish evidence which he may have no means of procuring, for he has no control over the principal administrator. It may not accomplish the equality which is the great object to be attained by it; for if the estate in the hands of the principal administrator is greater in proportion to the claims there to be paid, than that in the hands of the ancillary administrator in proportion to the claims allowed under that administration, no decree can be made under the latter which will give the creditors there a *pro rata* distribution, unless their claims have been allowed under the principal administration also. It is only when the funds collected under the ancillary administration will give the creditors in that government as great a share as the others that the equality sought is to be attained by that process. Another objection is, that if, by the laws of other governments, there are "fanciful preferences" existing there, the rule cannot be made reciprocal in its operation; for in a case in which the ancillary administration exists there, and the principal one in a State where by the laws there is to be an equal distribution, the courts in which the ancillary administration proceeds must give effect to the preferences there allowed, whether they are regarded as fanciful or otherwise; and in that case the surplus of the assets, over and above the rateable share of the creditors there, will not be transmitted to the place of the principal administration, that the creditors there may have an equal share. Besides, if there is anything here which should be distributed with reference to the laws of another government, or with reference to the property which is to be disposed of by the operation of those laws, we can hardly regard the preferences they give as fanciful, or disregard the laws themselves, while we take into account the property on which they are to act.

It will deserve further consideration, when a case arises which shall require it, whether it is not the better rule to distribute the assets, under the ancillary administration, among all those who have entitled themselves to payment, or a dividend, there, without reference to the amount of the estate, or claims elsewhere. So long as it is open for all to present and prove their claims, this rule will provide for as equal a distribution as the laws permit. If creditors fail of obtaining a full share, through their own laches, they will have no cause of complaint.

It may be, that upon the final distribution in the place of the domicil, among the creditors who have pursued their claims there, such regard should be had to the dividends, or payments, which have been received

in the place of the ancillary administration, as to distribute the assets, as far as possible, among those entitled according to the law of the domicile. Regard is, of course, to be had to such payments far enough to provide that no creditor shall receive more than his whole demand, by means of having had it allowed in different jurisdictions. But we may well dismiss the further discussion of this matter at the present time. *Motion denied.*¹

PARDO v. BINGHAM.

ROLLS COURT. 1868.

[*Reported Law Reports, 6 Equity Cases, 485.*]

THIS was a creditors' suit for the administration of the estate of Augustus Frederic Hamilton, and now came on to be heard on further consideration.

Mr. Hamilton was an Englishman by birth, but was at the time of his death, and had been for many years previously, resident in Venezuela. It did not appear, however, that he had acquired a domicile in that country.

In 1846 Hamilton executed, in Venezuela, an instrument in the Spanish language for the purpose of securing to one Level de Goda the payment of a sum of £1,600. This instrument was registered in Venezuela in accordance with the forms prescribed by the law of that country; and by virtue of such registration, De Goda became entitled, according to that law, to be paid the sum so secured out of Hamilton's general assets in priority to all the other creditors.

The only fund available to the creditors consisted of two sums of bank annuities, over which Hamilton had a general power of appointment by will, which he had exercised.

The question was now raised whether the court, in distributing this fund, would give effect to the priority acquired by De Goda over the other creditors of the testator.²

¹ It is generally held that a foreign creditor may prove his claim with an ancillary administrator, and if payment is refused sue him to recover the amount of the claim. *Miner v. Austin*, 45 Ia. 221; *De Sobry v. De Laistre*, 2 H & J. 193; *Washburn's Estate*, 45 Minn. 242, 47 N. W. 790; *Carroll v. McPike*, 53 Miss. 569; *Hopper v. Hopper*, 125 N. Y. 400, 26 N. E. 457; *In re Adlum's Estate*, 22 Pa. 514 (*semble*). *Contra*, *Shegogg v. Perkins*, 34 Ark. 117; *Hunt v. Fay*, 7 Vt. 170 (altered by statute, *Prentiss v. Van Ness*, 31 Vt. 95).

In *Davis v. Esty*, 8 Pick. 475, it was held that a domestic creditor would be allowed no greater proportion of his claim out of the domestic estate than the whole body of creditors would obtain from the estate at large. In *Hays v. Cecil*, 16 Lea, 160, a foreign creditor who had already received as large a proportion of his claim as would be allowed from the domestic estate was not permitted to prove. — ED.

² Arguments of counsel are omitted. — ED.

LORD ROMILLY, M. R. Unless both the debtor and the creditor were domiciled in Venezuela, I think that the registration of this document can only affect assets in Venezuela over which that country has power.

I do not think that I can properly direct an inquiry as to the domicile, unless a strong case is made out for the purpose. It was the duty of Mr. Hemming's client to make out his case; and he ought not to come here upon one ground, and when that fails, try to succeed upon another. If any inquiry, therefore, is to be directed, it must be upon a special application made to me. That being so, I am of opinion that a debt contracted with a foreigner by an Englishman living abroad does not entitle the foreigner, by reason of any particular law of his country, to claim priority in payment of his debt out of a fund which, by the law of this country, is equitable assets for the benefit of all the creditors of the debtor. The fund must be distributed according to the law of this country; and I will make an order accordingly.¹

ANONYMOUS.

CHANCERY. 1722.

[*Reported 9 Modern, 66.*]

THE testator, who lived in Holland, and who was seized of a real estate there, and of a considerable personal estate in England, devised all his real estate to the plaintiff, and all his personal estate to the defendant, whom he made executor, and died. But at the time of his death he owed some debts by specialties and some by simple contract in Holland, and had no assets there to satisfy those debts, other than by his real estate, which, by the custom and laws of Holland, is made liable to the payment of debts upon simple contract as well as upon specialties if there are not personal assets to answer the same, especially debts upon simple contract for servants' wages or for work done.

Now the creditors in Holland sued the plaintiff there, to whom the real estate was devised, and had a sentence against it by virtue whereof it was sold for the payment of their respective debts.

Thereupon the plaintiff exhibited this bill against the defendant, who was executor, and to whom the personal estate was devised as

¹ *Acc.* In *re Kloebe*, 28 Ch. D. 175; *Smith v. Bank*, 5 Pet. 518. *Wilson v. Dunsany*, 18 Beav. 293, *contra*, is overruled.

In *Miller's Estate*, 3 Rawle, 312, the opinion was expressed that as to assets transmitted from another country for administration, creditors from that country who were forced to follow the assets might be entitled to priority according to their law. *Acc.* *Hanson v. Walker*, 7 L. J. Ch. (o. s.) 135.

The allowance of expenses is also regulated by the law of the forum. In *re Adlum's Estate*, 22 Pa. 514. — Ed.

aforesaid, that he (the plaintiff) might be reimbursed by the defendant for the loss he had sustained in not bringing the personal estate to Holland to discharge the debts there in aid of the real estate.¹

THE COURT [LORD MACCLESFIELD, L. C.]. By the laws of Holland all debts shall affect the real estate there; but it is there, as it is here, that the personal estate shall come in aid of the real estate, and be charged in the first place; therefore the personal estate in this case should answer the loss the plaintiff sustained by the sale of the real estate, though that happened in a different dominion.

Therefore it was decreed that the plaintiff should be reimbursed.²

YOUNG v. WITTENMYRE.

SUPREME COURT OF ILLINOIS. 1888.

[*Reported 123 Illinois, 303.*]

CRAIG, J. This is an appeal from a decree of the Probate Court of Cook County, which ordered the sale of certain real estate to pay the debts of the estate of William Wittenmyre, deceased.

William Wittenmyre was a resident of Cook County, and died intestate, in Cook County, January 4, 1879, leaving a widow, Susan C. Wittenmyre, appellee here, and two children by a former wife, Sallie A. Young and Charles A. Wittenmyre, his only heirs-at-law. On the 14th day of January, 1879, the widow, on her petition, was appointed administratrix of the estate by the Probate Court of Cook County. Wittenmyre, prior to his death, had been engaged in business in Appanoose County, Iowa, and at the time of his death was possessed of a large amount of personal property in that county, consisting mainly of a stock of goods in a general store. In the month of February, 1879, the widow was appointed by the Circuit Court of Appanoose County, Iowa, administratrix, to administer upon the assets in that State. This appointment was made under a section of the statute of Iowa, which reads as follows: "If the administration of the estate of a deceased non-resident has been granted in accordance with the laws of the State or country where he resided at the time of his death, the person to whom it has been committed may, upon his application, and upon qualifying himself in the same manner as is required of other executors, be appointed to administer upon the property of the deceased in this State, unless another has been previously appointed." McClain's Stat. 1882, § 2368, p. 642.

On the 1st day of July, 1879, the administratrix filed, in the Probate

¹ Part of the case, involving another point, is omitted. — Ed.

² See *Hanson v. Walker*, 7 L. J. Ch. (o. s.) 135; *Harrison v. Harrison*, L.R. 8 Ch. 342; *Rice v. Harbeson*, 63 N. Y. 493; 16 Clunet, 308 (Colmar, 2 Mar. '87). — Ed.

Court of Cook County, an inventory, in which she inventoried the lands described in the petition. The inventory then stated "that no other property had come to the possession or knowledge of the administratrix." On the same date the appraisers made a return to the court that no property belonging to the estate, subject to appraisement, had come to their sight or knowledge. They also reported that they had estimated the widow's award at \$2,080. The allowance seems to have been approved by the court. No report of the assets in Iowa was ever made to the Probate Court in Cook County, and, so far as appears, after the filing of the inventory and appraisement bill containing the widow's allowance, as heretofore stated, no further steps were taken in the Probate Court of Cook County in the settlement of the estate, until this petition to sell real estate was filed. The administratrix, however, proceeded to settle up the estate in Iowa. August 15, 1879, she filed a report, which was approved on December 8 following. January 27, 1880, she filed another report, in which she showed that she had distributed \$2,850 of the personal estate in Iowa, — \$950 to herself, as widow, and \$950 to Sallie A. Young, and \$950 to Charles A. Wittenmyre, as heirs. This report was approved. On the 25th day of January, 1881, the administratrix made a final report, and was discharged. On the 11th day of March, 1881, this petition was filed to sell real estate in Cook County to pay the widow's award, and a claim of \$75 which had been allowed, and also the costs of administration, estimated at \$250. On the hearing, it turned out that the claim of \$75 had been paid from the assets in Iowa, and the administratrix had been allowed a credit for the amount. The widow's award was reduced to \$1,500, and the court found the deficiency of personal estate to be \$1,030, and decreed a sale of real estate to pay such deficiency.

It is not claimed that there are any debts against the estate remaining unpaid, except the widow's allowance, and it is also an undisputed fact that the administratrix had in her hands an amount arising from the assets in Iowa, after the payment of all debts in that State, much larger than her specific allowance, which she of her own accord distributed between herself, as widow, and the two heirs. Under such circumstances, has she the right to obtain a decree to sell real estate to pay her specific allowance? In this State, the personal property is the primary fund for the payment of all debts against an estate, and under the terms of section 97 of chapter 3 of the Revised Statutes of 1874, it must appear that the personal estate of a decedent is insufficient to pay the debts before the real estate can be sold for that purpose. Here, if the personal assets in Iowa are to be taken into consideration, personal property which passed into the hands of the administratrix was ample to fully pay all just claims against the estate, and no satisfactory reason was shown, on the trial in the Probate Court, why the personal assets were not appropriated to the payment of debts until the debts were satisfied, — before a distribution was made between the heirs. As Cook County, in this State, was the residence of Wil-

liam Wittenmyre at the time of his death, the administration granted here was the principal administration, and the letters granted in Iowa were but an ancillary administration. *Stevens v. Gaylord*, 11 Mass. 262. It was no doubt the duty of the administratrix in Iowa to collect all debts due the estate there, and convert all assets within that jurisdiction into money, and from the money pay all debts established against the estate in that jurisdiction; but after the debts in Iowa had all been paid, and a large balance was left in the hands of the administratrix, she had no right whatever to distribute such balance among the heirs in Iowa, but, on the other hand, it was her duty to bring the balance into this State, in order that it might be disposed of under the authority of the court within whose jurisdiction the deceased had his domicile. The balance, whatever it was, should have been returned to the principal administration.¹ . . .

But it is said that the heirs (appellants here) “were parties to the accounting in Iowa, and having accepted their distributive shares there, cannot now be heard to say that this was all wrong.” There is some force in the position of appellee on this question, and if the heirs had been instrumental in requiring appellee to make distribution in Iowa, knowing that there remained a debt here unpaid, it may be that they might be estopped from insisting upon the defence here interposed, in opposition to a sale of property to pay the debt. But such was not the case. They did not require appellee to make a distribution of the assets in Iowa. Her action there was of her own free will. Nor does it appear that appellants knew that appellee held a claim in this State unpaid. On the other hand, appellee, knowing that she held a claim in this State, without being required to make a distribution in Iowa by the heirs or the court, voluntarily paid over money to the heirs which she ought to have retained, in payment of debts. Having done this, she is the one in the wrong, and she having had in her hands sufficient personal assets to pay all claims against the estate, both in Iowa and here, and having paid out such assets wrongfully, she cannot now obtain a decree to sell real property to pay debts which might and ought to have been paid from the personal assets.

The judgment of the Probate Court will be reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

COWDEN v. JACOBSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1896.

[Reported 165 *Massachusetts*, 240.]

MORTON, J. This is an appeal by an administrator from a decree of the Probate Court in Worcester County disallowing certain items in his

¹ The court here cited and discussed the cases of *Jennison v. Hapgood*, 10 Pick. 77, and *Fay v. Haven*, 3 Met. 109. — ED.

account. At the hearing before the Chief Justice, the appellee desired to contest other items in the account besides those involved in the appeal of the administrator, but the court ruled that it was not open to her to contest other independent items. The appellee does not question now the correctness of the ruling, and we think that it clearly was right. *Boynton v. Dyer*, 18 Pick. 1; *Harris v. Harris*, 153 Mass. 439.

The principal matter in dispute relates to the disallowance of the payment by the administrator of a note held against the intestate at her decease by Walter B. Chase of Sutton in this State, an heir at law. The intestate lived in Connecticut, where she possessed real and personal estate. She also possessed real estate in Sutton. The appellant, who lives in Worcester, was appointed administrator in both States. The next of kin were Walter B. Chase aforesaid, a brother, and one Hattie H. Jacobson of Portland, Maine, a half sister. By the laws of Connecticut kindred of the whole blood take to the exclusion of the half blood. There were debts of the intestate in this State, consisting of the note to Chase, and of unpaid taxes on the estate in Sutton. During the settlement of the estate in Connecticut the note was presented by Chase to the judge of probate, as it is provided by the Connecticut statutes may be done with claims when the administrator lives out of the State (Gen. Sts. of Conn. of 1888, § 582), and he, on learning that there was estate of the deceased in this Commonwealth, declined to allow it on the same grounds as debts due Connecticut creditors, and the note was not allowed, and does not seem to have been presented again to that court. Subsequently the administrator in Connecticut, having settled his account with the estate in the Probate Court there, and having in his hands for distribution, as appeared from said account, \$1,425.13 in personal estate, was ordered by the Probate Court under the statute for such cases made and provided (Gen. Sts. of Conn. of 1888, § 628) to pay the same to said Chase as the heir-at-law, and did so. The estate in Sutton was sold by the administrator pursuant to license from the Probate Court, and the note was paid out of the proceeds. The appellee, who was a minor, had notice of the petition to sell the real estate in Sutton, and also of the action of the court in Connecticut in regard to distribution, but made no objection to the proceedings until the administrator presented his account for allowance to the Probate Court of Worcester County.

The appellee contends that the note should have been paid by the administrator out of the personal estate in Connecticut, and she relies on *Livermore v. Haven*, 23 Pick. 116, and also on *Fay v. Haven*, 3 Met. 109, where another question growing out of the same controversy was considered. But in *Livermore v. Haven*, as was observed in substance in *Prescott v. Durfee*, 131 Mass. 477, the question was whether the court in its discretion should grant a license under the circumstances to sell real estate in this Commonwealth for the payment of debts. In this case the license has been granted by a court of com-

petent jurisdiction, after due notice, and the sale has been made, and neither those proceedings nor the validity of the appointment of the administrator can now be attacked collaterally by the appellee. *Pierce v. Prescott*, 128 Mass. 140. It does not appear that the payment by the administrator was not made in good faith, or that there was any collusion between him and Chase in regard to the settlement of the estate in Connecticut, or the sale here.

If there were collusion or bad faith the case might stand differently. *Stevens v. Gaylord*, 11 Mass. 256, 266. The distribution of the estate in Connecticut was made under an order of the Probate Court, which has not been impeached in any respect. The administrator was bound to comply with it, and for aught that appears would have been liable to a suit on his bond if he had failed to do so. Though administrator of both estates, he could not have been compelled to apply the personal property in Connecticut to the payment of debts here, nor have been held accountable for it here. *Boston v. Boylston*, 2 Mass. 384; *Hooker v. Olmstead*, 6 Pick. 481; *Fay v. Haven*, 3 Met. 109, 114; *Wheelock v. Pierce*, 6 Cush. 288; *Norton v. Palmer*, 7 Cush. 523. If it was necessary, in order to justify the payment of the note out of the proceeds of the real estate sold here, for the administrator to show that the creditor had used some diligence to collect the note out of the personal estate in Connecticut, and that he had met with some legal impediment there, we think it sufficiently appears that he had done so. He presented his claim to the proper tribunal, which declined to allow it except subject to the priorities of Connecticut creditors. It certainly would be going very far to hold that, under such circumstances, he was bound to wait upon and follow the settlement of the Connecticut estate, instead of resorting to the real estate here.

In *Prescott v. Durfee*, *ubi supra*, it was held that a Massachusetts creditor of a New York intestate, who died possessed of real estate here but no personal estate, might procure the appointment of an administrator in this State, and attach the real estate to recover the payment of his demand. It appeared that an administrator had been appointed in New York, and that there was personal estate there more than sufficient to pay all the debts, and there was nothing to show that the creditor had made any effort to collect his debt out of the personal estate in New York. But neither fact appears to have been regarded as material.¹

If there had been different administrators in Connecticut and Massachusetts, and the same course had been pursued by them in regard to the respective estates that has been followed by the present administrator, we presume that it hardly would be contended that the payment of Chase's note by the administrator in this State should be disallowed. We do not see that it makes any difference on principle that the same person was administrator in both jurisdictions. As already ob-

¹ *Acc. Rosenthal v. Renick*, 44 Ill. 202; and see *Hobson v. Payne*, 45 Ill. 158; *In re Gable's Estate*, 79 Ia. 178, 44 N. W. 352. — Ed.

served, he is not accountable here by reason of that fact for the estate in Connecticut. See *State v. Osborn*, 71 Mo. 86. If he has not administered the estate in Connecticut according to law, doubtless he is liable there upon his bond. This court cannot revise his actions as administrator of that estate. *Jennison v. Hapgood*, 10 Pick. 77, 101. If he has administered it according to law, still less can his conduct be made the foundation of liability by reason of the payment of Chase's note out of the proceeds of the real estate in Sutton. The appellee's contention would seem to go the length of requiring him to maintain that, although the administrator administrated the estate in Connecticut in good faith, and distributed it according to the direction of the court having jurisdiction of it, the payment of Chase's note should be disallowed because the administrator did not see that it was paid out of the personal estate in Connecticut. If that be so, then, without adverting to other considerations, the converse of the proposition must be equally true; namely, that the creditor was bound to obtain payment out of the personal estate in Connecticut, and had no right to resort to the real estate here, which would be at variance with *Prescott v. Durfee*, *ubi supra*. We do not think that either proposition can be maintained when applied to the circumstances of this case. It is not contended that it was the duty of the administrator in Connecticut to see that creditors presented their claims and were paid out of the personal estate there, and we assume that he committed no breach of his bond by failing to do so, or to appeal from the ruling of the Probate Court disallowing the note. In the absence of personalty in this State, the real estate constituted a fund for the payment of debts here. The administrator was not bound to see that either estate was exonerated at the expense of the other. He was required to administer and dispose of each estate in good faith according to the law of the State where it was situated. In respect to this item there is nothing to show that he has not done so. We think that the payment to Chase should have been allowed.

The two remaining items relate to the burial of the deceased whose remains were brought into this Commonwealth and consist of the undertaker's services and the cost of digging the grave. They were incurred before but not paid till after the settlement of the account in Connecticut, and were not included in it. No doubt, if there had been but one administrator, and he in Connecticut, these items would have been allowed in his account if duly presented to and paid by him. *Jennison v. Hapgood*, 10 Pick. 77, 86, 87. But though the administration here was ancillary to that in Connecticut, we think that these expenses must be regarded as incurred by the ancillary administrator in the due course of his administration of the estate in this Commonwealth, and that as such they should be paid out of the property available here for the payment of demands due to creditors residing in that State.

A majority of the court think that the decree of the Probate Court should be reversed in respect to the items appealed from, and affirmed in other particulars, and it is

So ordered.

SMITH v. HOWARD.

SUPREME JUDICIAL COURT OF MAINE. 1894.

[Reported 86 Maine, 203.]

WHITEHOUSE, J. This is an appeal from the decree of a judge of probate, allowing the account filed by the defendant, as administratrix on the estate of her husband, whose domicile was in Massachusetts at the time of his death. The appellants are the children and heirs of the decedent, and the only item in the account to which they object is a credit of \$700, being the amount granted to the widow as her allowance, by the judge of probate in this State. The defendant took out the ancillary administration in this State in May, 1892, on personal property amounting to \$850. In June of the same year, she took out the principal administration in the place of the domicile of the decedent; but the entire estate in that jurisdiction, small in amount, was exhausted in effecting a settlement by compromise with the creditors in that State. No allowance was made to the widow, or applied for by her, in Massachusetts. The allowance in question was made by the judge of probate in this State in July, 1892.

The only question presented by the agreed statement, accompanying the appeal, is whether the judge of probate in this State had jurisdiction and authority to decree this allowance to the widow of a non-resident decedent from assets in this jurisdiction on which there is ancillary administration.

In determining this question, a new one in this State, it is proper to be reminded that courts of probate are tribunals of special and limited jurisdiction only. They are wholly creatures of the legislature. They exercise only such powers as are directly conferred upon them by legislative enactment, and such as may be incidently necessary to the execution of these powers. Unless authority for the exercise of jurisdiction in a given case can be found in the statutes, given either expressly or by implication, the proceeding is void. *Woerner's Am. Law of Ad.*, § 142; *Fowle v. Coe*, 63 Maine, 248.

It is furthermore important to observe that, in order to discover the true scope and purpose of statutes defining the powers of these courts, they are to be examined in the light of the common law, which it may be supposed they were intended to modify, affirm, or supersede, or by which their practical operation might be affected. In this case it is proper to consider that the statutes of every State are enacted primarily with reference to the citizens within its own jurisdiction; that it is the right of a State to pass laws for the appropriation of any property of a decedent within its limits to the payment of the just claims of creditors residing there, even if not in entire harmony with the spirit of comity between States; and that letters of administration have no legal force or effect beyond the territorial limits of the State in which they are

granted. *Saunders v. Weston*, 74 Maine, 92 ; *Smith v. Guild*, 34 Maine, 443 ; *Story, Conf. of Laws*, § 512. These statutes are also to be construed with due regard to the universal rule which Chancellor Kent declares to be as "settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to, and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated." 2 Kent's Com. 571 ; *Gilman v. Gilman*, 53 Maine, 184 ; *Wharton on Conf. of Laws*, §§ 604, 627. The principle last stated, as will presently be seen, is expressly recognized and affirmed in our statutes. (R. S. c. 65, § 36.)

In the subdivision of chap. 65, R. S., entitled, "Allowances to widows and others," is the following in section 21 : "In the settlement of any intestate estate, or of any testate estate, which is insolvent, or in which no provision is made for the widow in the will of her husband, or when she duly waives the provisions made, the judge may allow the widow so much of the personal estate beside her ornaments and wearing apparel as he deems necessary, according to the degree and estate of her husband, and the state of the family under her care." The last subdivision of this chapter is entitled, "Distribution of the estates of deceased non-residents." In the first section of it (§ 36) is the following : "When administration is taken in this State on the estate of any person who at the time of his death was not an inhabitant thereof, his estate found here, after payment of his debts, shall be disposed of according to his last will . . . if he left any ; but if not . . . his personal estate shall be distributed according to the laws of the State or county of which he was an inhabitant ; and the judge of probate, as he thinks best, may distribute the residue of said personal estate as aforesaid, or transmit it to the foreign executor or administrator, if any, to be distributed according to the law of the place where the deceased had his domicile." These are modified forms of the original enactments of 1821 (§§ 8, & 39, c. 51), which were adopted from Massachusetts. In that State the corresponding statutes were enacted at different periods, that relating to ancillary administration, in the form as adopted, having been enacted in Massachusetts, in 1818. None of the enactments providing for administration on the estates of deceased non-residents in Maine or Massachusetts at any time contained any express reference to a widow's allowance.

It is manifest from the history of these two sections in our Revised Statutes above quoted, and their present collocation in chapter 65, as well as from a comparison of their respective terms and provisions, that section 21 has reference solely to the estates of deceased residents. It was not designed to embrace the estates of deceased non-residents. With respect to the latter, the jurisdiction of the court of probate is clearly defined and limited in section 36. In case of an intestate, it is

simply the duty of the judge to order the residue of the estate, after the payment of debts, to be distributed here, or transmitted to the foreign administrator, to be distributed, in either event, according to the law of the place where the deceased had his domicile. So long as there are creditors within the jurisdiction of the ancillary administration, they have a legal right to insist upon having all the assets found there appropriated to the payment of their debts. The court has no authority to order the assets to be transmitted under this statute, until the creditors here are all paid, and it has no jurisdiction to determine that there are no unpaid creditors here until the expiration of the time fixed by law for presenting their claims. *Newell v. Peaslee*, 151 Mass. 601; 1 *Woerner's Am. Law of Ad.*, § 167. For aught that appears all the assets inventoried in this jurisdiction may yet be required to pay the claims of creditors residing here.

No authority to make an allowance to the widow of such non-resident decedent is expressly conferred by this section; nor is it granted by implication as necessary to the discharge of the duties that are expressly imposed. A widow's claim for an allowance is not deemed a matter of legal right either in this State or Massachusetts. It rests merely in the discretion of the judge of probate. *Kersey v. Bailey*, 52 Maine, 198; *Dale v. Bank*, 155 Mass. 141. It is not a fixed and absolute interest in the estate. *Additon v. Smith*, 83 Maine, 554; *Adams v. Adams*, 10 Met. 170. It is not a debt due from the estate nor a distributive share of it. It is not included in the "expenses of administration." *Washburn v. Hale*, 10 Pick. 429.

The widow's allowance was originally designed to afford a temporary supply for the widow and her family pending the settlement of the estate. It had its origin in a humane and beneficent public policy that seeks to encourage the continuance of the family relations by providing against the exigencies arising from the death of the head of the family. *Bailey v. Kersey*, *supra*. When, therefore, a claim for such an allowance from the personal property of her husband is presented by the widow, it is held with substantial uniformity that the question must be determined and the amount regulated by the law of the place where the family resided and had their home at the time of the husband's death. *Gilman v. Gilman*, *supra*; *Shannon v. White*, 109 Mass. 146; *Woerner, supra*, § 89. It is conceded by the defendant that such is undoubtedly the law; but it is still contended that without express statutory provisions, after the analogy of the distribution of the assets, and as a matter of comity, the allowance in question was properly granted by the court in this State, and should be sustained if made in accordance with the law of Massachusetts. Whatever may reasonably be urged, *ex comitate* in favor of such a practice in the courts of the situs, in cases where there are no debts, towards domiciliary jurisdictions where the amount of the allowance is definitely fixed by statute, serious difficulties are encountered in attempting to apply it here.

Section 2 of c. 135 of the Pub. Stat. of Massachusetts is made a part of the agreed statement, and is as follows: —

“Such parts of the personal estate of a deceased person as the Probate Court, having regard to all the circumstances of the case, may allow as necessary to his widow, for herself and for his family under her care, or, if there is no widow, to his minor children, not exceeding fifty dollars to any child, and also such provisions and other articles as are necessary for the reasonable sustenance of his family, and the use of his house and the furniture therein for forty days after his death, shall not be taken as assets for the payment of debts, legacies, or charges of administration.”

It will be seen that this statute differs in important particulars from the corresponding statute in this State. There, in case of a will, the allowance may be granted to the widow in addition to the provisions for her in the will (*Williams v. Williams*, 5 Gray, 24); here, by the terms of the statute it is contingent on her waiver of the provisions in the will. It is also manifest that in other respects the nature and office of the allowance are essentially unlike in the two States. There the statute aptly illustrates the original purpose of the allowance, as stated above, while in this State the practical construction has been much more liberal, and the authority to grant an allowance is not confined to cases of mere temporary relief. *Bailey v. Kersey*, 52 Maine, 198. In the recent case of *Dale v. Bank*, 155 Mass. 144, the court says upon this point: “As a result of a uniform line of authorities, the rule is established that the court has no right under the statute to attempt to modify the provisions of a will, or to change the course which property of an intestate takes under the statute of distribution, or to take the estate from creditors to provide for the future of an unfortunate widow who is left dependent on her own resources. The purpose of an allowance is to provide for the necessities of the widow and minor children for a short time, until they have an opportunity to adjust themselves to their new situation.” This is strikingly at variance with the practical construction of the Maine statute; and if the defendant would avail herself of the rule of comity which she invokes, she should at least be able to make it affirmatively appear that the allowance was in fact made in accordance with the Massachusetts statute as construed by the courts of that State. It is not expressly stated, however, to have been made with any reference whatever to the Massachusetts statute. On the contrary it may fairly be inferred, from the statement of the case, and from the comparatively large amount of the allowance, that it was made under the influence of the law and practice of our own State, as in ordinary cases of domiciliary administration here.

But if it be conceded that the judge of probate intended to make the allowance in accordance with the law of Massachusetts, there are still insuperable objections to such a practice under circumstances like those here stated. In the first place, it would be incompatible with the rights of creditors under the provisions of section thirty-six which require all debts to be paid before any of the assets can be remitted to

the place of the domicil. In this case, there may be no creditors in Maine; but that question has not yet been determined, as nearly a year yet remains within which the claims of creditors may be enforced.

Again, the domiciliary court is the appropriate one to determine the amount of the allowance. That is not fixed by the statute in Massachusetts, but is left entirely to the sound discretion of the judge of probate. In performing this duty he is to have "regard to all the circumstances of the case." The social position of the husband at the time of his death, as indicating the demands which might be made on the widow; the style in which she has been accustomed to live, the amount of the estate, and the amount of her separate property, the length of their cohabitation, and the size of the family under her charge, the place of residence, and the treatment of each to the other, and many other like considerations, may all be taken into the account in fixing the amount of the allowance. *Allen v. Allen*, 117 Mass. 27; *Hollenbeck v. Pixley*, 3 Gray, 521; *Washburn v. Washburn*, 10 Pick. 374; *Gilman v. Gilman*, 53 Maine, 184; *Walker*, Applt., 83 Maine, 1. All these things can be more fully and correctly ascertained, and all branches of inquiry respecting them more easily prosecuted in the jurisdiction where the family had their home. Their social position and style of living can be better understood and appreciated in the community in which they have lived. "The place of the domicil is where we should look to ascertain the real condition of the decedent's affairs." *McNichol v. Eaton*, 77 Maine, 249. It appears that the decedent's domicil was in Waltham in the State of Massachusetts at the time of his death. It does not appear that he ever resided in Maine, or that the defendant has ever resided here either before or since the death of her husband. Her domicil was merged in that of her husband.

Another practical difficulty would be met in the application of such a rule of comity. If the defendant is entitled to have an allowance from the assets found in this State, she would have an equal right to it in every other State in which personal property of her husband might be found. Embarrassing questions respecting the numerous claims that might be presented in different jurisdictions would thus inevitably arise.

The conclusion is that the judge of probate in this State had no authority to make the allowance to the widow on the facts stated, and that the item of seven hundred dollars was improperly allowed in the defendant's account.

Whether the defendant's situation would have been improved if she had obtained a decree for an allowance from the Probate Court of Massachusetts, with a representation of insufficient assets there to respond to it, and had then by proper application asked to have the claim satisfied from the assets in this State, subject to the claims of creditors residing here, or whether further legislation authorizing such procedure would be necessary or expedient, are questions not before this court. The question before us has seldom arisen, and no

decision involving the precise state of facts here presented has been brought to the attention of the court. But eminently respectable authorities involving a similar state of facts strongly support the views above stated. In *Richardson v. Lewis*, 21 Mo. App. 531, the domicil of the decedent and his family was in Illinois at the time of his death, and the widow obtained an order from the court there for the payment of an allowance under the laws of that State. There were insufficient assets in Illinois to satisfy the claim, but further assets were found in St. Louis. Thereupon the widow applied to the court in St. Louis for the allowance provided for by the laws of Missouri, and it was held that the Missouri statutes authorizing such allowance had no application to the widows of non-resident decedents, and the application was denied. In the opinion by Judge Thompson the court says: "We rest our decision upon the universal principle of the common law that the succession of the personal property of a deceased person is governed exclusively by the law of his actual domicil at the time of his death." . . . "The statutes invoked are a temporary provision for the widows of deceased persons analogous to the provisions of statutes exempting certain property of debtors from execution. The very nature of such an allowance precludes the idea that the widow can be entitled to it in any State except that of the husband's domicil; for otherwise she would be entitled to this exemption from the claims of his creditors in every State in which he might have personal property."

In *Medley v. Dunlap*, 90 N. C. 527, the decedent had his domicil in Arkansas at the time of his death. His widow soon after removed to North Carolina and there applied for an allowance under the laws of that State. It was held that she was not entitled to it; but in the opinion the court says: "If the laws of Arkansas provide for such an allowance, the plaintiff ought to have applied there and had her claim allowed and paid, or, if there were not sufficient assets to pay it there, then she might have her claim thus allowed, satisfied out of assets in this State, upon proper application to the administrator here. But she cannot reach the assets of her deceased husband here in any other way." See also *Simpson v. Cureton*, 97 N. C. 113; *Spier's Appeal*, 26 Pa. St. 233; *Shannon v. White*, 109 Mass. 146; *Woerner's Am. L. of Ad.* § 80.

*Appeal sustained.*¹

HARVEY v. RICHARDS.

CIRCUIT COURT OF THE UNITED STATES. 1818.

[*Reported 1 Mason, 381.*]

STORY, J.² The question which has now been argued lies at the very foundation of the plaintiff's suit, and is of great importance and no in-

¹ *Acc. Smith v. Smith*, 174 Ill. 52, 50 N. E., 1083; *Short v. Galway*, 83 Ky. 501. — Ed.

² The statement of facts and arguments of counsel are omitted. — Ed.

considerable difficulty. I have taken time to consider it; and after a full consideration of all the authorities, commented on with so much learning and ability by the counsel, I am now to pronounce the result of my own judgment on the case.

For the purposes of the argument, it is assumed or conceded that the testator (dying intestate as to the residue of his estate, of which distribution is now sought) was at his decease domiciled at Calcutta, in the East Indies; that his will has been duly proved, and administration there taken upon his estate by his executor; that the defendant has under the directions of that executor taken administration of the testator's estate in Massachusetts, and in virtue thereof has received a large sum of money, which now remains in his hands; that no part of this money is wanted at Calcutta for the payment of any debts or legacies under the will; and that the plaintiff is a citizen of Rhode Island, and domiciled there; and as one of the next of kin of the testator is entitled to a moiety of the undivided residue of the testator's estate. The question then is, whether, under these circumstances, this court as a court of equity can proceed to decree an account and distribution of the property so in the hands of the defendant, or is bound to order it to be remitted to Calcutta, to be distributed by the proper tribunal there.

There are some points involved in the argument which may be disposed of in a few words. In the first place the distribution, whether made here or abroad, must be according to the law of the place of the testator's domicile. This, although once a question vexed with much ingenuity and learning in courts of law, is now so completely settled by a series of well considered decisions, that it cannot be brought into judicial doubt. In the present case, the law of Calcutta, or rather of the province of Bengal, is, as I apprehend, the law of England; and as that is the same as the law of Massachusetts, the distribution would be the same as if the testator had died domiciled here. In the next place, the court of chancery has an ancient and settled jurisdiction to decree an account and distribution of a testator's and an intestate's estate, on the application of the legatees or next of kin; and supposing this to be a fit case for the application of its authority, the present suit would fall completely within that jurisdiction. In the next place, the equity powers and authorities of the courts of the United States are, in cases within the limits of their constitutional jurisdiction, co-equal and co-extensive, as to rights and remedies, with those of the court of chancery. The present is a suit between citizens of different States over whom this court has an unquestionable right to entertain jurisdiction; and it will follow of course, that the plaintiff is entitled to the relief she prays for, if it be competent and proper for any court of equity to grant it.

Having disposed of these preliminary points, we may now return to the consideration of the great question in controversy. Stated in broad terms it comes to this, whether a court of equity here has competent

authority to decree distribution of intestate property collected under an administration granted here, the intestate having died domiciled abroad, and the distribution being to be made according to the law of his foreign domicile. The counsel for the defendant deny such authority, under any circumstances; the counsel for the plaintiff as strenuously assert it.

This is a question involving the doctrines of national comity, or, what may be more fitly termed, international law. And looking to it as a question of principle, it would not seem to be attended with any intrinsic difficulty. The property is here, the parties are here, and the rule of distribution is fixed. What reason then exists why the court should not proceed to decree according to the rights of the parties? Why should it send our own citizens to a foreign tribunal to seek that justice which it is in its own power to administer without injustice to any other person? I say without injustice, because it may be admitted that a court of equity ought not to be the instrument of injustice, and that if in the given case such would be the effect of its interposition, it ought to withhold its arm. This, however, would be an objection, not to the general authority, but to the exercise of it under particular circumstances. The argument, however, goes the length of denying the existence of that authority, whatever may be the circumstances of the case. Yet cases may be readily imagined in which it might not be inequitable to interfere, nay, in which there might be very cogent reasons for interference. Suppose there are no debts abroad, and no heirs or legatees abroad, but all are here, and apply to the court for a decree of distribution, is the court bound to remit for the vain purpose of putting the legatees or distributees to great expense and delay in seeking their rights in a foreign tribunal? Suppose two executors are appointed by the testator, one abroad and one here (and such cases are not uncommon), and the bulk of the property is collected here, and all the legatees are here, shall the court direct the domestic executor to remit the whole property to the foreign executor because it is to be distributed according to the law of the foreign domicile? Suppose further, the executor here is himself the residuary legatee, or, in case of intestacy, the administrator here is the next of kin and entitled to the surplus, shall he be required to remit the property abroad, that he may be there decreed to receive it again? Suppose legacies, payable out of particular funds here, or a specific legacy of property here, shall not the legatee be entitled to recover of the administrator or executor here, because the testator was domiciled in a foreign country? Suppose a legacy to charitable uses in this country, good by our law, but which, from motives of policy, the courts of the foreign country decline to enforce, shall it be said that our courts are bound to enforce, by remitting the property there, a policy by which they are injured? Whatever may be thought of the last case, there can be no doubt that the others present circumstances where equity would strongly persuade us that it would be the duty of our courts to entertain jurisdiction and decide

on the rights of the parties. There are many other cases in which it would seem fit to vindicate and assert the proper rights of our own citizens and our own laws. This very case, under one aspect, would have presented a question of which our own tribunals might as justly have claimed an exclusive cognizance, and which, I trust, they would have decided with as much impartiality as the tribunals of the testator's domicile. Major Murray was an American citizen, born in Rhode Island; and if he left no lawful heirs (as has been argued in a former part of this case) his property here, supposing he had acquired no foreign domicile, would have undoubtedly fallen as an escheat to that State; and it would deserve consideration whether the change of domicile would work any alteration in that respect. Under such circumstances, would it be proper to send the State of Rhode Island to solicit its rights from a foreign tribunal in the East Indies?

One objection urged against the exercise of the authority of the court is, that as national comity requires the distribution of the property according to the law of the domicile, the same comity requires that the distribution should be made in the same place. This consequence, however, is not admitted; and it has no necessary connection with the preceding proposition. The rule, that distribution shall be according to the law of the domicile of the deceased is not founded merely upon the notion that movables have no situs, and therefore follow the person of the proprietor, even interpreting that maxim in its true sense, that personal property is subject to that law which governs the person of the owner. Nor is it, perhaps, founded upon the presumed intention of the deceased, that all his property should be distributed according to the law of the place of his domicile with which he is supposed to be best acquainted and satisfied; for the rule will prevail even against the express intention of the deceased, unless the mode in which that intention is expressed would give it legal validity as a will. It seems, indeed, to have had its origin in a more enlarged policy, founded upon the general convenience and necessities of mankind; and in this view the maxim above stated flows from, rather than guides, the application of that policy. The only reason why any nation gives effect to foreign laws within its own territory is the endless embarrassment which would otherwise be introduced in its own intercourse with foreign nations. The rights of its own citizens would be materially impaired, and, in many instances, totally extinguished, by a refusal to recognize and sustain the doctrines of foreign law. The case now under consideration is an illustration of the perfect justice and wisdom of this general practice of nations. A person may have movable property and debts in various countries, each of which may have a different system of succession. If the law *rei sitæ* were generally to prevail, it would be utterly impossible for any such person to know in what manner his property would be distributed at his death, not only from the uncertainty of its situation from its own transitory nature, but from the impracticability of knowing, with minute accuracy, the law of succession of every

country in which it might then happen to be. He would be under the same embarrassment if he attempted to dispose of his property by a testament; for he could never foresee where it would be at his death. Nay more, it would be in the power of his debtor, by a mere change of his own domicil, to destroy the best digested will; and the accident of a moment might destroy all the anxious provisions of an excellent parent for his whole family. Nor is this all. The nation itself to which the deceased belonged might be seriously affected by the loss of his wealth from a momentary absence, although his true home was in the centre of its own territory. These are great and serious evils pervading every class of the community, and equally affecting every civilized nation. But in a maritime nation, depending upon its commerce for its glory and its revenue, the mischief would be incalculable. The common and spontaneous consent of nations, therefore, established this rule from the noblest policy, the promotion of general convenience and happiness, and the avoiding of distressing difficulties, equally subversive of the public safety and private enterprise of all. It flowed from the same spirit that dictated judicial obedience to the foreign commissions of the admiralty. *Sub mutuae vicissitudinis obtentu, damus petimusque vicissim*, is the language of the civilized world on this subject. There can be no pretence that the same general inconvenience or embarrassment attends the distribution of foreign effects according to the foreign law by the tribunals of the country where they are situate. Cases have been already stated in which great inconvenience would attend the establishment of any rule excluding such distribution. It may be admitted also, that there are cases in which it would be highly convenient to decline the jurisdiction and remit the parties to the *forum domicilii*. Where there are no creditors here, and no heirs or legatees here, but all are resident abroad, there can be no doubt that a court of equity would direct the remittance of the property upon the application of any competent party.

The correct result of these considerations upon principle would seem to be, that whether the court here ought to decree distribution or remit the property abroad, is a matter, not of jurisdiction, but of judicial discretion, depending upon the particular circumstances of each case. That there ought to be no universal rule on the subject, but that every nation is bound to lend the aid of its own tribunals for the purpose of enforcing the rights of all persons having title to the fund, when such interference will not be productive of injustice or inconvenience, or conflicting equities.

It is farther objected, that a rule which is to depend for its application upon the particular circumstances of each case, is too uncertain to be considered a safe guide for general practice. But this objection affords no solid ground for declining the jurisdiction, since there is an infinite variety of cases in which no general rule has been or can be laid down, as to legal or equitable relief, in the ordinary controversies before judicial tribunals. In many of these the difficulty is intrinsic in

the subject-matter ; and where a general rule cannot easily be extracted, each case must, and indeed ought to, rest on its own particular circumstances. The uncertainty, therefore, is neither more nor less than belongs to many other complicated transactions of human life where the law administers relief *ex æquo et bono*.

Another objection, addressed more pointedly to a class of cases like the present, is the difficulty of settling the accounts of the estate, ascertaining the assets, what debts are sperate, what desperate, and, finally, ascertaining what is the residue to be distributed, and who are the next of kin entitled to share. And to add to our embarrassment, we are told that we cannot compel the foreign executor to render any account in our courts. I agree at once that this cannot be done if he is not here ; but I utterly deny that the administrator here cannot be compelled to account to any competent court for all the assets which he has received under the authority of our laws. And if the foreign executor chooses to lie by, and-refuses to render any account of the foreign funds in his hands, so far as to enable the court here to ascertain whether the funds are wanted abroad for the payment of debts or legacies or not, he has no right to complain if the court refuses to remit the assets and distributes them among those who may legally claim them. And as to settling the estate, or ascertaining who are the distributees, there is no more difficulty than often falls to our lot in many cases arising under the ordinary probate proceedings.

All these objections are, in fact, reasons for declining to exercise the jurisdiction in particular cases, rather than reasons against the existence of the jurisdiction itself. It seems, indeed, admitted by the learned counsel for the defendant, that if there be no foreign administration, it would be the duty of the court to grant relief upon an administration taken here. Yet every objection already urged would apply with as much force in that as in the present case. The property would be to be distributed according to the foreign law of the deceased's domicil. The same difficulty would exist as to ascertaining the debts and legacies, and the assets and distributees entitled to share. But it is said in the case now put, the administration here would be the principal administration, whereas in the case at bar it is only an auxiliary or ancillary administration. I have no objection to the use of the terms principal and auxiliary, as indicating a distinction in fact as to the objects of the different administrations ; but we should guard ourselves against the conclusion that therefore there is a distinction in law as to the rights of parties. There is no magic in words. Each of these administrations may be properly considered as a principal one, with reference to the limits of its exclusive authority ; and each might, under circumstances, justly be deemed an auxiliary administration. If the bulk of the property and all the heirs and legatees and creditors were here, and the foreign administration were only to recover a few inconsiderable claims, that would most correctly be denominated a mere auxiliary administration for the beneficial use of the parties here,

although the domicile of the testator were abroad. The converse case would of course produce an opposite result. But I am yet to learn what possible difference it can make in the rights of parties before the court whether the administration be a principal or an auxiliary administration. They must stand upon the authority of the law to administer or deny relief, under all the circumstances of their case, and not upon a mere technical distinction of very recent origin.

I have already intimated my opinion as to the true principle that ought to regulate cases of this nature; and I have endeavoured to answer the most pressing objections satisfactorily at least to my mind. If, therefore, the question were *res integra*, I should have no difficulty in deciding that whether distribution ought or ought not to be decreed should depend upon the circumstances of each case; that no universal rule ought to be laid down on the subject; or at least, that the rule should be flexible, and depend for its application upon the equity of the particular case presented to the court. . . .¹

I have made some researches in the works of foreign jurists for the purpose of ascertaining what is the practice of nations governed by the civil law. Those researches have not been very satisfactory; but they leave little room to doubt that foreign tribunals sustain suits to enforce distribution of assets collected there under auxiliary administrations upon the doctrines so familiar in those courts, that the *situs rei*, as well as the presence of the party, confers a competent jurisdiction. 2 Hub. p. 2, lib. 5, tit. 1, § 43; 1 Hub. p. 1, lib. 3, tit. 13, § 20, *sub finem*; 1 Domat, 531, note; Constit. Frederii. Imp., tit. 1, § 10; Bynk. Quest. Priv. Jur., lib. 1, ch. 16.

Upon the whole my judgment (though delivered with the greatest deference for a different judgment entertained by others) is, that a court of equity here has authority to decree distribution in cases like the present, according to the *lex domicilii*, upon the application of the legatees or the next of kin or other competent parties; that whether it will decree distribution must depend upon the circumstances of each case; and that it is incumbent on those who resist the distribution to establish in the given case, that it may work injustice or public mischief. This doctrine is, as I think, sustained by principles of public policy, and is perfectly consistent with international comity. It stands also commended by its intrinsic equity; and although the authorities are not uniformly in its favor, yet they leave the court at liberty to pronounce that judgment which, if the question were entirely new, it would be disposed to entertain. *Vide* Toller's Law of Executors, 387; 1 Woodes Lect. 384, 385.²

¹ The learned judge here examined several Massachusetts and English cases. — ED.

² *Acc. Ewing v. Orr Ewing*, 10 App. Cas. 453; *Fretwell v. McLemore*, 52 Ala. 124; *Gibson v. Dowell*, 42 Ark. 164 (*semble*); *Casilly v. Meyer*, 4 Md. 1; *Succession of Gaines*, 46 La. Ann., 14 So. 602; *Parsons v. Lyman*, 20 N. Y. 103; *In re Hughes*, 95 N. Y. 55; *Carr v. Lowe*, 7 Heisk. 84; *Porter v. Heydock*, 6 Vt. 374; *Moses v. Hart*, 25 Grat. 795; *Estate of Youmans*, 10 Hawaii, 207. *Contra*, *Richards v. Dutch*, 8 Mass.

EMERY v. BATCHELDER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[Reported 132 *Massachusetts*, 452.]

MORTON, C. J. This is a bill to require the defendants, as executors of the will of Daniel Austin, to reserve and set apart out of the estate of said Austin a fund sufficient to pay the plaintiff an annuity of four hundred dollars a year, given to her by the will.

It appeared at the hearing that the testator was a citizen of the State of Maine; that he died in December, 1877, in Kittery in that State; that his will was duly proved there in March, 1878, and the defendants were duly appointed and qualified as executors; that the defendants, who are residents of this Commonwealth, proved, in June, 1878, the will in the Probate Court for the county of Suffolk, and ancillary letters testamentary were issued to them; that, in October, 1880, the said executors filed their final account in the Probate Court for Suffolk County, showing that the balance in their hands was paid to said executors as executors under the appointment of the Probate Court in Maine, which account was allowed.

It also appeared that the estate now in their hands as such executors is not sufficient to pay all the legacies in full; and the question which the plaintiff desires to raise by this bill is, whether the annuity given to her is to abate in common with the other legacies, or is to be paid in full in preference to them.

It is too well settled, as a general rule, to admit of any doubt, that an executor or trustee appointed by judicial decree of a court of another State is accountable only in the courts of that State for the due execution of the trust, and the trust cannot be enforced in this Commonwealth, although the executor or trustee resides here. *Jenkins v. Lester*, 131 *Mass.* 355, and cases cited.

The plaintiff contends that this case is taken out of the general rule by the fact that the will was proved here, and ancillary letters testamentary issued to the defendants. Whether, if the defendants had now in their hands as such ancillary executors any balance for which they are liable to account to the Probate Court of Suffolk County, this court could and would entertain jurisdiction of a bill like this, which affects the rights of all the other legatees and the marshalling and distribution

506. In Pennsylvania there appear to be two lines of authority. One line holds that the court of ancillary administration must transmit the balance to the court of principal administration for final distribution. *Appeal of Barry*, 83 *Pa.* 131. The other line holds that such transmission is discretionary with the court. *Welles's Estate*, 161 *Pa.* 218, 23 *Atl.* 1116. These conflicting authorities have not been reconciled. *Laughlin v. Solomon*, 180 *Pa.* 177, 180.

The court should not retain the balance until it is satisfied that the foreign assets are sufficient to pay all claims against the estate. *Hutton v. Hutton*, 40 *N. J. Eq.* 461; *Hamilton v. Levy*, 41 *S. C.* 374, 19 *S. E.* 610. — *Ed.*

of the whole estate, is a serious question which we are not required to consider. The defendants have not in their hands any funds as executors appointed in this State. They have transmitted the balance of the estate which was in their hands as such executors to themselves as executors in Maine, and this has been allowed and approved by the Probate court of Suffolk County.

Our statutes provide that, where ancillary administration is taken out in this State, upon the settlement of the estate, after the payment of the debts for which it is liable in this State, the residue of the personal estate may be distributed according to the will, "or in the discretion of the court it may be transmitted to the executor or administrator, if there is any, in the State or country where the deceased had his domicile, to be disposed of according to the laws thereof." Gen. Sts. c. 101, §§ 38, 39.

The allowance of the final account, in which the defendants credited themselves with the residue in their hands as paid to the executors in Maine, was in effect an order of the court that such residue should be transmitted to the defendants as principal executors appointed in Maine. If the executors in the two States had been different persons, it is clear that the executors here could not be held accountable in our courts after they had, under an order of the Probate Court, transmitted the balance in their hands to the executors in Maine. They then would have fully administered the estate here, and there would be nothing upon which a decree of the court here could act.

The principle is the same where the executors in the two States are the same persons. They act in each State in a different capacity, and are in law regarded as different persons. When the defendants acting as executors in Massachusetts transmitted the estate in their hands, as such executors, to themselves, acting as executors in Maine, they had performed all their duties in Massachusetts, and were no longer accountable as executors here. They thereby placed the whole of the estate of the testator within the jurisdiction and control of the courts of Maine, and are accountable for it there. We are of opinion that this jurisdiction is exclusive, and that this court cannot entertain a bill in equity, for the purpose of construing the will and marshalling and distributing the estate.

*Bill dismissed.*¹

¹ In a similar case where the property so carried to the foreign account was brought back again into the State, it was held that it could not again be administered within the State. *Spradling v. Pipkin*, 15 Mo. 118.

After the ancillary account is allowed, the administrator is chargeable in the State of principal administration with the amount of the balance. *Jennison v. Hapgood*, 10 Pick. 77; *Conover v. Chapman*, 2 Bail. L. 436. It has been held that the account can be reopened in the State of principal administration. *Leach v. Buckner*, 19 W. Va. 36. — ED.

SECTION II.

WARDSHIPS.

IN RE KNIGHT.

COURT OF APPEAL. 1898.

[*Reported* [1898] 1 *Chancery*, 257.]

IN August, 1894, Agnes Maria Knight, widow, a resident in the Island of Jersey, was found by an order of the Royal Court of Jersey a person of unsound mind, and a gentleman resident in Jersey was, under the laws of the island, appointed curator of her property and person. The personal estate of the lunatic comprised a sum of Consols and also shares in an English bank and an English limited company all standing in her name. The curator accordingly presented a petition in Lunacy under section 134 of the Lunacy Act, 1890, asking for an order for transfer of the stock and shares into his name. Upon the petition coming before the judge in Lunacy, it was supported by an affidavit by the curator showing that the property required to be transferred was to be used for the maintenance or sole benefit of the lunatic; but the judge made a note that the affidavit "did not show that the money was needed for maintenance or for any other purpose of the lunatic." The curator, however, contended that, having been appointed in Jersey and having undertaken to get in the property of the lunatic, he was entitled as of right to have the stock and shares transferred to him, and that the court had no jurisdiction to deal with the lunatic's property beyond ordering a transfer of it to him, the curator, who was responsible to the Jersey court for the due application thereof. The curator then filed a further affidavit stating that according to the law of Jersey the whole personal estate of a person to whom a curator had been appointed by the royal court of Jersey vested absolutely in such curator, who was able to deal with the same absolutely as directed by his electors, being persons who in the present case had, under the direction of the Jersey court, made an inquiry into the mental condition of the lady. Upon the petition coming before him again on that affidavit the judge ordered the petition to be adjourned into court for argument on the question of jurisdiction.¹

LINDLEY, M. R. We all take the same view of this case. It was urged before the judge in Lunacy, sitting in chambers, that he had no jurisdiction in the matter, and the case was adjourned into court to have that point decided. I am clearly of opinion that Mr. Wood has put his case too high, and that it is not our duty to make an order parting with the possession of the lunatic's property without exercising some discretion in the matter. The section of the Lunacy Act, 1890,

¹ Arguments of counsel are omitted. — ED.

dealing with this property, that is, with stock that cannot be transferred without an order, is section 134, which runs thus: [His Lordship read the section, and continued:—]

Now, Mr. Wood has brought himself within this section so far as it gives him the right to make this application. In *In re Brown* this court put an extensive rather than a restrictive interpretation on the words “vested in a person appointed for the management” of the property of the lunatic; and having regard to that decision, we are quite right in saying that the personal property of this lady has become “vested” in the applicant according to the law of Jersey within section 134 and the decision in *In re Brown*, [1895] 2 Ch. 666.

Then comes the question, What ought we to do? We should be running counter to what has been the established practice for the last one hundred years or more, if we were to hold that the court has no discretion in such a case as this. Mr. Wood has referred us to *Julius v. Bishop of Oxford*, 5 App. Cas. 214; but that case does not appear to carry him through at all. If we have property of a lunatic here, it is, to my mind, clear almost to demonstration that we have a discretion under section 134 as to granting or refusing such an application as this. Section 90 says, in sub-section 1, that “The judge in Lunacy may upon application by order direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs.” Then sub-section 2 says: “Where the alleged lunatic is within the jurisdiction, he shall have notice of the application and shall be entitled to demand an inquiry before a jury.” Then section 96 says: “Where the alleged lunatic is not within the jurisdiction it shall not be necessary to give him notice of the application for inquisition, and the inquisition shall be before a jury.” The section, it will be observed, says “shall.” Now just consider the effect of those sections. The law is not new: it is as old as the time of Lord Hardwicke, that in the case of a person resident abroad and having property in this country, the court has jurisdiction to direct an inquisition as to such person and to appoint a committee of that property. So that, if anybody were to apply here for an inquisition as to the sanity of this lady, the court would have jurisdiction to appoint a committee of the property of this lady within the jurisdiction, and to administer her estate. How, then, can it be incumbent upon this court, without exercising any discretion at all, to hand over this property to a foreign curator? If Mr. Wood’s contention is right, the court would lose the jurisdiction which it clearly has over a foreign lunatic’s property in this country. The real truth is that the jurisdiction of the court over lunatics who have property within the jurisdiction cannot be ousted by such ambiguous words as we find in section 134. The point was to some extent considered in *In re Brown*, *supra*, where it was said that the court must be cautious not to hand over the property unless a proper case was made out. There the court was satisfied that the property

was, in fact, required for the maintenance and support of the lunatic, who was resident in Victoria, and, therefore, made an order under section 134 for a transfer of funds in this country belonging to the lunatic to the Master in Lunacy in Victoria.

For the reasons I have given, and having regard to the terms of section 134 and comparing the terms of section 134 with sections 90 and 96, and also having regard to the long-established practice as to the jurisdiction of this court, I am clearly of opinion that Mr. Wood has put his case too high, and that the court has jurisdiction to exercise its discretion as to making an order such as is now asked for. This case was adjourned into court to have the question of jurisdiction decided. The application must stand over in order that the applicant may be at liberty to file further evidence showing that the fund is required for the maintenance of the lunatic according to the law of Jersey, and the grounds upon which the transfer of the stock should be made.

RIGBY, L. J. I am of the same opinion. We should not only be overruling, if not extinguishing, long-established authorities, but deciding something quite novel, if we were to hold that under section 134 the court has no discretion. No doubt, *prima facie* the proceedings in Lunacy abroad should be treated with all respect here, and in this case it may very well be that, acting upon our discretion, we may ultimately make the order asked for under section 134; that, however, must depend upon the nature of the further evidence that may be filed by the applicant. But, in my opinion, the point, which is the only one now before us, namely, whether we have a discretion, must be decided against the applicant.

VAUGHAN WILLIAMS, L. J. I am of the same opinion.

LINDLEY, M. R. We give the applicant leave to bring in a further affidavit. It is his duty to get in as much of the lunatic's property as he can.¹

IN RE CHATARD'S SETTLEMENT.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1899.

[Reported [1899] 1 Chancery, 712.]

PETITION. By a settlement made on the marriage of François Guillaume Eugène Chatard and Sarah his wife (formerly Sarah Barnes, spinster), and dated October 10, 1845, a sum of £2,000, £3 5s. per cent Reduced Annuities, which had been transferred into the names of trustees, was settled upon trust during the joint lives of the husband and wife to pay the annual produce to the wife as a separate and inalienable provision for her during her coverture, and after the decease

¹ Acc. Murray v. Baillie, 21 Scot. Jur. 239. — Ed.

of either of them upon trust to pay the annual proceeds to the survivor of them during his or her life, and after the decease of the survivor upon trust for such one or more exclusively of the other or others of the children or remoter issue of the marriage as the husband and wife should by deed, or the survivor of them should by deed or will, appoint.

There were issue of the marriage two daughters, one of whom, Sarah Ann Eugénie Chatard, intermarried with Louis Eugène Ballot, who was a French subject and domiciled in France, and died in the lifetime of her mother, Sarah Chatard, leaving two children of her marriage with Louis Eugène Ballot her surviving, namely, a daughter, Fernande Ballot, born on August 24, 1881, and a son, Charles Ballot, born on November 14, 1886.

In the year 1866 Robert Malcolm Kerr, the sole surviving trustee of the settlement of October 10, 1845, paid and transferred the trust fund into court under the provisions of the Trustee Relief Act; and by an order dated December 12, 1866, the interest accruing on the fund in court was directed to be paid to Sarah Chatard during her life for her separate use.

François G. E. Chatard died on February 14, 1893.

Sarah Chatard died on June 3, 1898, having by her will, dated July 13, 1896, in pursuance of the power given to her by the settlement, appointed and directed that the trust fund should be held in trust for Fernande Ballot and Charles Ballot, to be equally divided between them, share and share alike.

The funds subject to the settlement were now represented by a sum of £2,001 0s. 3d. New Consols and £26 12s. cash standing to the credit of this matter.

This petition was presented by Fernande Ballot and Charles Ballot, both of Paris, by Louis Eugène Ballot, their father and lawful guardian and next friend, praying that the funds in court might be dealt with by paying thereout a sum of cash due to the legal personal representative of Sarah Chatard and the costs of the applicants, and dividing the residue in moieties, and paying one moiety to Louis Eugène Ballot as the guardian of Fernande Ballot, and the other moiety to Louis Eugène Ballot as the guardian of Charles Ballot.

By the 14th paragraph of the petition it was stated as follows: "By the law of France the said Louis Eugène Ballot as the legal guardian of your petitioners is entitled to receive and give legal discharges for all monies coming to his children during their minority."

By the suggestion of his Lordship the case was argued in the first instance on the footing that this statement was strictly proved.¹

KEKEWICH, J. This case has been argued at my suggestion on the footing that the 14th paragraph of the petition is strictly proved. [His Lordship read the paragraph and continued:—]

I apprehend that, assuming that statement to be true, it would be

¹ Arguments of counsel are omitted. — ED.

quite right for me, if I thought fit, to direct the payment as asked. And further, if the fund had not been paid into court the trustee would have had a legal discharge if he had paid the money of the infants to their guardian. But it seems to me that the question now is whether I am bound to do that. Here are two infants who are entitled under a settlement to the fund which has been paid into court. If I am bound to pay the fund to their guardian, of course I must do my duty. If I am not so bound, then I have a discretion in the matter which I must exercise on proper materials, which are not at present before me.

The point is put as one of principle supported by some authority. In two of the cases which have been referred to, namely, *In re Crichton's Trust*, 24 L. T. (o. s.) 267, and *In re Ferguson's Trusts*, 22 W. R. 762, before the Master of the Rolls in Ireland, the infants whose property was dealt with were Scottish. In each case the infant had reached the age of puberty, as established by the law of Scotland, and though not *sui juris* in England, was competent to give a discharge in Scotland. That, of course, in itself makes a difference. But further than that, according to Scottish law, as was proved in the Irish case and was capable of proof in the English case, security is required to be given by the curator truly to account for all sums received on behalf of the minor. That seems to me to make a considerable difference, sufficient to distinguish those cases from the present one. From the other cases which have been cited I do not derive much assistance. In the case of *In re Brown's Trust*, 12 L. T. 488, a fund devolving upon an infant under a settlement made according to the law of Prussia was ordered to be paid to the father as guardian, upon evidence that "by the law of Prussia he was entitled in that character to receive the fund and administer it during the infant's minority." That is exactly what the petition says here, and Wood, V.-C., on hearing the evidence, made the order. What evidence there was which influenced the judge it is not easy to say. The report of the case is a very short one. No argument is reported on the part of the counsel for the petitioner, and no one appeared on behalf of the respondent. I do not think it is a case which can be relied on as establishing a principle. *In re Hellmann's Will*, L. R. 2 Eq. 363 is still further off. Mr. Ingpen properly called my attention to it, though it is not altogether in his favour. The editor of Simpson on Infants suggests that it ought not to be followed. I think that, at all events for the present purpose, it ought not to be regarded. It was the case of a petition under Lord St. Leonards' Acts, 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, which enabled trustees to apply to the Court of Chancery for the opinion or direction of the judge respecting the management or administration of trust property. I think I ought to bear in mind how petitions under the Acts were commonly drawn, namely, by stating all such facts as would induce the court to make the order desired, and the petition in the case in question may have been drawn upon that basis. Apart from the fact that the Master of the Rolls in that case did not take the same view as the

petitioners did, I think that a decision on a petition under those Acts cannot possibly be treated as a decision that a person in the position of this French guardian is entitled as of right to have the fund in court paid to him. It appears to me that I ought to consider whether, when the fund is handed over to the guardian, it will be properly applied for the benefit of the infants, and whether it is not better that it should remain here and be paid to them when they attain their majorities. If, for instance, it were proved that they were amply provided for, why should I pay it over so that it may be spent in a way which, for aught I know, may not be for their benefit? Evidence may be forthcoming which will satisfy me; but I am not asked to pay out on that footing, but to pay it to this guardian as a matter of right. Assuming that he is entitled to give a receipt, I should be perfectly within my right if I paid it to him, and nobody could say I had acted contrary to law; on the other hand, it seems to me that having the custody of the fund for the infants, I ought not to pay it over unless I think that in their interest that ought to be done. Mr. Ingpen also cited two other cases as to the appointment of guardians. They may be useful on that branch of the law, but I do not think they apply with sufficient directness to the case before me.

Mr. Ingpen has not referred me to a class of cases — to which I can refer only by memory — in which the court has had to consider whether, in the case of a foreign lunatic being entitled to a fund in court, the curator or other person appointed to act, and acting under the control of the foreign court, was entitled to have the money paid him on behalf of the lunatic. The case with which we are best acquainted is *In re Barlow's Will* [1887], 36 Ch. D. 287, but there are several other cases, both in this court and in the Court of Appeal (see *In re Brown*, [1895] 2 Ch. 666; *In re De Linden*, [1897] 1 Ch. 453; *In re Knight*, [1898] 1 Ch. 257; cited in *Lewin on Trusts*, 10th ed. pp. 416, 417), and, unless I am in error, the court has always required to be satisfied that the money is to be paid over to the foreign official for some purpose to which it is his duty to apply it.

Accordingly, I shall be willing to consider any evidence which may be laid before me in reference to the proposed application of the money, and the case may be put in the paper again for that purpose.

[The matter was again brought before his Lordship in chambers on Monday, March 29, but as no satisfactory evidence was then offered to enable him to exercise his discretion he directed that (subject to any application on further evidence) the costs should be paid out of the fund, and the balance carried over to the separate account of each infant, and the income accumulated.]¹

¹ *Acc. Ponder v. Foster*, 23 Ga. 489; *Earl v. Dresser*, 30 Ind. 11; *In re Wilson*, 95 Mo. 184, 8 S. W. 369; *Douglas v. Caldwell*, 6 Jones Eq. 20; *Ex parte Smith*, 1 Hill Eq. 140; *Clendenning v. Conrad*, 91 Va. 410, 21 S. E. 818. In several States it is provided by statute that a foreign guardian of a non-resident may apply to the Probate Court for the payment over to him of the ward's personal property. *Grimmett*

DIDISHEIM v. LONDON AND WESTMINSTER BANK.

COURT OF APPEAL. 1900.

[Reported [1900] 2 Chancery, 15.]

LINDLEY, M. R.¹ This action is by M. Didisheim and by Madame Goldschmidt; by him as her next friend. The object is to obtain a large sum of cash and also share and stock certificates and scrip for bearer bonds and shares of great value from the defendants. The defendants are quite ready to pay and deliver these up provided they

v. Witherington, 16 Ark. 377; *In re Benton*, 92 Ia. 202, 60 N. W. 614; *Martin v. McDonald*, 14 B. Mon. 544. This statute, however, does not affect the power of the court in its discretion to refuse the application. *In re Wilson*, *supra*.

The general principles governing the administration of the estate of a foreign ward are the same as those applied to the administration of a foreign decedent's estate. A guardian must be appointed for the personal property of the ward in each State in which property is situated. *Hoyt v. Sprague*, 103 U. S. 613; *Kraft v. Wickey*, 4 G. & J. 332; *Morrell v. Dickey*, 1 Johns. Ch. 153. If a balance is ordered by one State to be carried into another, the guardian is accountable for it in the latter. *Jefferson v. Glover*, 46 Miss. 510.

A foreign guardian cannot sue. *Morgan v. Potter*, 157 U. S. 195; *Smith v. Mad-den*, 78 Fed. 833; *Verrier v. Verrier*, 7 Phila. 618. He may however bring on his ward's behalf a petition in a foreign probate court; such a proceeding is not bringing suit. *McCleary v. Menke*, 109 Ill. 294; *Earl v. Dresser*, 30 Ind. 11. A foreign guardian cannot be sued. *Donley v. Shields*, 14 Oh. 359. Nor can he be called to account in any but the court that appointed him. *Burnet v. Burnet*, 12 B. Mon. 323; *Bell v. Suddeth*, 2 Sm. & M. 532. Nor will consent of all parties confer jurisdiction on the foreign court to settle the accounts. *Anderson v. Story*, 53 Neb. 259, 73 N. W. 735. The account must be settled in each State for the property there belonging. *Smoot v. Bell*, 3 Cr. C. C. 343. It has been held, however, that if the guardian and infant ward remove to a foreign State and the ward there comes of age, he may sue for money had and received for the money due him from the guardian, since he cannot have an account. *Pickering v. De Rochemont*, 45 N. H. 67.

A guardian has of course no power to convey or to manage foreign land. *Smith v. Wiley*, 22 Ala. 396; *McNeil v. First Congregational Society*, 66 Cal. 105, 4 Pac. 1096; *Watts v. Wilson*, 93 Ky. 495, 20 S. W. 505; *Bailey v. Morrison*, 4 La. Ann. 523. And if land of the ward is sold by order of court, or taken by proceedings in eminent domain, the proceeds will be retained by the court, and only the income remitted to the foreign ward. *Clay v. Brittingham*, 34 Md. 675; *In re Department of Public Works*, 89 Hun, 529, 35 N. Y. Supp. 332. But see *Johnson v. Avery*, 11 Me. 99.

If the guardian who comes into possession of certificates of stock in a foreign corporation assigns the stock, the assignee may have the stock transferred to his name on the books. *Ross v. S. W. R. R.*, 53 Ga. 514. It has been held, however, that since a guardian (unlike an administrator) gets no title to the ward's property, he cannot follow into another jurisdiction property once reduced by him to possession and wrongfully taken from him, but suit must be brought by a guardian appointed in the State into which the property is taken. *Grist v. Forehand*, 36 Miss. 69.

The management of the entire property of a ward, it has been held, should be uniform, and in accordance with the law of the domicile. *Lamar v. Micou*, 112 U. S. 452. — Ed.

¹ Part of the opinion only is given. — Ed.

can safely do so. The bulk of the property sought to be recovered formed part of the assets of M. Goldschmidt, a deceased gentleman, domiciled and resident in Belgium. He died some time ago, and his widow, the plaintiff, Madame Goldschmidt, obtained letters of administration with his will annexed. By her directions most of the property in the hands of the defendants has been placed in their books in her name. She is domiciled in Belgium and is resident abroad. She has become insane and is in a foreign lunatic asylum. M. Didisheim has been duly appointed her "administrateur provisoire," with power to collect and get in all her personal estate. He is also now the legal personal representative of M. Goldschmidt, having obtained letters of administration to his personal assets left unadministered by Madame Goldschmidt. He and she together, therefore, are clearly entitled to all the property sought to be obtained from the defendants. They do not deny M. Didisheim's right as administrator to such assets of the deceased as have not become Madame Goldschmidt's property; but they say that, owing to what she did when sane, all his assets in their hands became hers, and they are now accountable to her alone for them. As to the cash, certificates and scrip which are the property of Madame Goldschmidt, the defendants say they cannot safely hand them over to M. Didisheim, as the ownership of them is still vested in her and has not been legally vested in M. Didisheim. NORTH, J. has held that, unless an order is made in lunacy requiring or authorizing the defendants to deliver the property of Madame Goldschmidt to M. Didisheim, they cannot safely deliver such property to him.

The relations and friends of Madame Goldschmidt are particularly desirous of avoiding any formal adjudication of lunacy, and this appeal has been brought on purpose to avoid the necessity of such an adjudication. The title of the plaintiffs, it will be observed, is a purely legal title; there is no trust in the case. Under the old practice one action could not have been maintained to enforce a claim by M. Didisheim as administrator and also a claim by Madame Goldschmidt to recover her own property. Two separate actions of detinue or trover would have been necessary. Our modern practice, however, is less rigid, and the defendants have raised no objection to the two claims being joined in one action. The court, therefore, can properly entertain the action and decide the real question raised by the defendants, which is whether, in an action brought by M. Didisheim in his own name and in the name of Madame Goldschmidt and as her next friend the High Court ought to make an order for the delivery to him of her property. The question may be put in another way, whether he is entitled in an action so framed to demand delivery of her property to him. We are of opinion that he is.

In *Scott v. Bently*, 1 K. & J. 281, a person resident in Scotland was entitled to an annuity charged on land in England and secured by a covenant entered into with himself. The annuitant became lunatic,

and a *curator bonis* was appointed according to Scottish law. Whether he was judicially declared a lunatic does not distinctly appear; nor does it appear that the ownership of his personal property was by Scottish law divested from him and vested in his curator. We rather infer that the curator merely had power to collect it and get it in. The annuity being in arrear, the curator brought a suit in Chancery in his own name against the executrix and devisee in trust of the grantor of the annuity for payment of the arrears and for payment of the annuity in future. It is to be observed that the demand of the plaintiff was a purely legal demand. He sought to enforce the legal right of the annuitant under the covenant and grant. But the arrears seem to have been set apart as a trust fund, and this was held enough to give the Court of Chancery jurisdiction to entertain the suit. Wood, V.-C., made an order as prayed by the bill. This decision has been much questioned; but unless it be that the suit ought in strictness to have been in the name of the lunatic by his curator as next friend, we see no ground for doubting the correctness of the decision.

Scott v. Bentley, *supra*, has been questioned mainly because it proceeded to some extent on the supposed authority of a decision in the House of Lords on an appeal from Scotland, in *In re Morrison's Lunacy*, Mor. Dict. 4595, 1 Cr. St. & P. 454. This case appears to have been to some extent misunderstood. The Vice-Chancellor refers to it as an unreported case cited in *Johnstone v. Beattie*, (1843) 10 Cl. & F. 42, and in *Sill v. Worswick*, (1791) 1 H. Bl. 677-8, 2 R. R. 816. In *Johnstone v. Beattie*, 10 Cl. & F. 97, Lord Brougham refers to *Morrison's Case*, *supra*, as cited in the note to *Sill v. Worswick*, *supra*, and as an authority for the proposition that the legally appointed curator in one country was held entitled to act in another. This, it is plain, was also Wood, V.-C.'s, view of *Morrison's Case*, as is apparent from his remark (1 K. & J. 285) that in *Morrison's Case* the curator sued alone. But the reports of that case to which we have referred, *supra*, show that the decision of the House of Lords in *Morrison's Case* did not go that length, and Lord Campbell was not satisfied that it did (10 Cl. & F. 133). We understand the decision as showing that a committee appointed in England of a Scotsman resident in England could not sue in Scotland simply in his own name and as committee for the recovery of the lunatic's personal estate; but that such committee could sue there in the name of the lunatic for the recovery of the lunatic's personal estate. *Morrison's Case*, therefore, did not go so far as Wood, V.-C., thought, but it goes a long way to show that the proceedings in this action are properly framed; for this action is brought, not only by M. Didisheim in his double capacity of administrator of Madame Goldschmidt and curator of Madame Goldschmidt, but also by her in her own name suing by M. Didisheim as her next friend. In *Scott v. Bentley*, *supra*, Wood, V.-C., did not by any means base his judgment only on the supposed decision in *In re Morrison's Lunacy*, *supra*, and after making every

allowance for his misapprehension in that case, *Scott v. Bentley* was, in our opinion, well decided, although we cannot help thinking that, if Wood, V.-C., had known the form of the order made in Morrison's Case, he would have directed the bill to be amended by making it in form a bill by the lunatic by his curator and next friend.

In *Alivon v. Furnival*, 1 C. M. & R. 277, 286, 40 R. R. 561, Parke, B. expressed a clear opinion to the effect that a foreign curator could sue here in his own name for goods and chattels of a person of unsound mind.

Scott v. Bentley, *supra*, is consistent with and is really supported by several other cases cited by Mr. Haldane, and of which *Re Tarratt*, 51 L. T. 310, *In re De Linden*, [1897] 1 Ch. 453, and *Thiery v. Chalmers, Guthrie & Co.*, [1900] 1 Ch. 80, are the most recent and important. In *In re De Linden*, an application was made on behalf of a Bavarian lunatic lady for payment out to two foreign gentlemen of some money in court belonging to her. The application was by her in her own name by her next friend, who was a Bavarian judge and one of two persons appointed by a Bavarian court to take charge of her and her property. The order was made as asked — that is, for payment, not to her, but to the two persons appointed as above mentioned. The lady had been judicially declared lunatic, but there was no judicial vesting of her property in the curators.

Thiery v. Chalmers, Guthrie & Co., *supra*, was a similar case. The lunatic there was a French subject declared lunatic in France, and whose property was placed under the care of a duly appointed *tuteur*. An action was brought in this country by the lunatic by a next friend and by the *tuteur* as a co-plaintiff to recover money and securities in the hands of the lunatic's bankers. An order was made for the delivery of them to the *tuteur*. Kekewich, J., thought that the *tuteur* might have sued alone in his own name. He regarded the decision in *In re Brown*, [1895] 2 Ch. 666, as an authority for so holding, inasmuch as both in *In re Brown* and in *Thiery v. Chalmers, Guthrie & Co.* the lunatic had been formally so declared by the foreign court. But *In re Brown* was not an action; it was an application to the Court in Lunacy under section 134 of the Lunacy Act, and we doubt whether the action in *Thiery v. Chalmers, Guthrie & Co.* would have been rightly framed if brought by the *tuteur* as sole plaintiff.

An alteration in the status of a lunatic appears to be necessary in order to enable the Court in Lunacy to exercise the jurisdiction conferred upon it by section 134 of the Lunacy Act, 1890; but it by no means follows that persons, whose status has not been altered by their being judicially declared lunatic cannot sue by themselves by a next friend for the recovery of their own property. *In re Knight*, [1898] 1 Ch. 257, turned on the discretion which the court had under section 134 of the Lunacy Act, and throws no real light on this case.

The only difficulty in the way of the plaintiffs is occasioned by *In re Barlow's Will*, 36 Ch. D. 287. In that case a colonial statute vested

in a Master in Lunacy the care and custody of the property of lunatic patients — that is, of persons confined in lunatic asylums but not judicially declared lunatic. A colonial lady, confined in a lunatic asylum in the colony, was entitled to some funds in the hands of trustees in this country, and the colonial Master in Lunacy claimed these funds. The trustees paid them into court under the Trustee Relief Act. The colonial Master and the lady by her next friend presented a petition for the transfer of the funds in court to the colonial Master in Lunacy. The court made an order for the payment out of capital of some past maintenance and for the payment of the income to the master whilst the lady continued in an asylum. But the court would not order the rest of the corpus to be paid over to the master. It is to be observed that the general statutory authority given by the Colonial Act to the master as an officer of the colonial court was not supplemented by any order giving the master any express authority, as the lunatic's attorney, to get in any property not locally within the jurisdiction of the court; and, as we understand Cotton, L. J.'s judgment, he was much influenced by the omission of any such order. If the master's authority derived from the colonial statute was unsatisfactory, it is obvious that such authority was not improved by his assumption of the right to use the lunatic's name. In that view of the case, the fact that the lunatic petitioned in her own name by her next friend did not remove the difficulty. Having decided that the master was not entitled as a matter of right to demand payment to himself, it became necessary for the court, acting as trustees, to consider what it was the duty of trustees to do in such a case as that before them; and they considered that in such a case the trustees ought not to part with the trust fund without seeing to its application, and ought not to part with the fund to the master further than they were satisfied that the interests of the lunatic rendered it necessary to do so. This was the view taken in *In re Garnier*, L. R. 13 Eq. 532, where, however, the lunatic was a domiciled Englishman, and we see no reason to dissent from it where the authority of the foreign curator to get in the trust property is regarded by the court as unsatisfactory. But where it is not, the considerations which weighed with the court in *In re Barlow's Will*, *supra*, do not arise. A person absolutely entitled to trust money is entitled to have it paid to him or to any one duly appointed by him to receive it, and the trustees or the court acting for them have no discretion to refuse payment. The same principle is, in our opinion, applicable to the case in which trust money belongs to a lunatic and a person is duly appointed by a competent authority to get in such money for the lunatic. If the title of the lunatic is clear, and the authority to act for him is equally clear, we fail to see what discretion the court, acting for the trustees, has in the matter. The trustees may properly say that they cannot safely act without the sanction of the court, but we fail to see what other discretion there is. Where the lunacy jurisdiction is being exercised, as it was in *In re Stark*, 2 Mac. & G. 174,

other considerations at once arise. If, as in *In re Garnier*, *supra*, the lunatic were an Englishman temporarily abroad, and confined as a lunatic abroad, we should feel considerable difficulty in holding that the courts of this country were bound to recognize the title of a foreign curator to sue in this country. But here we are dealing with an alien domiciled abroad, and over whom the courts of this country have no jurisdiction except such as is conferred by the fact that she has property here. All that the court here has to do is to see that the person claiming it is entitled to have it.

In this case the order of the Belgian court of November 25, 1899, removes all doubt as to M. Didisheim's authority to take these proceedings and to obtain and give a good discharge for the property which he seeks to recover. On general principles of private international law, the courts of this country are bound to recognize the authority conferred on him by the Belgian courts, unless lunacy proceedings in this country prevent them from doing so. What ought to be done in lunacy has not to be considered, and we say nothing on this subject. In our opinion, the appeal should be allowed, and an order be made as asked by the claim. But the plaintiffs must pay all the costs; for the bank was perfectly justified in not complying with M. Didisheim's demands without an order of the High Court — that is, without proving his title in such a way as to make it unreasonable for the bank to refuse to recognize it. Under the old practice an action of *detinue* or *trover* might have failed; for under the general issue the defendants could have given in evidence facts excusing delivery to a person rightfully entitled, but whose title was not such as the defendants could safely recognize. See per Blackburn, J., in *Hollins v. Fowler*, (1875) L. R. 7 H. L. 766, and the cases there cited. But in practice, if in such a case the plaintiff proved his title to the satisfaction of the court and paid the defendant's costs, the plaintiff always obtained delivery. Under the modern practice, if this case had been tried by a jury there would be no difficulty, we apprehend, in ordering delivery to M. Didisheim, and, in a proper case like this, giving the defendants the costs of the action — that is, there would be good cause for making the plaintiffs pay the costs, although they succeeded in establishing their title. See *Gleddon v. Trebble*, 9 C. B. (N. S.) 367. If the action were tried without a jury, whether in the Chancery Division, as this was, or in the Queen's Bench Division, the costs would be in the discretion of the judge, and there would be no difficulty in ordering delivery to the plaintiffs and ordering them to pay the costs. However tried, any other result would be very unjust.

Mr. Terrell suggested that the order of the court would not protect the bank if the lunatic were to recover and were to sue the bank for her money and property after the bank had paid and delivered it to M. Didisheim. We do not entertain any misgiving on this point. The High Court clearly had jurisdiction to entertain the action and to decide the questions raised in it, and to make the order which this

court now declares it ought to have made ; and this court clearly has jurisdiction to entertain this appeal. This being clear, and the Belgian court having had jurisdiction to make the order which it made, the bank would unquestionably have a perfectly good defence to any action which the lunatic could bring against it, either by another next friend or by another official curator, or by herself if she should recover.¹

SECTION III.

INSOLVENT ESTATES.

MAY v. WANNEMACHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1872.

[*Reported 111 Massachusetts, 202.*]

TRUSTEE process against Charles Wannemacher and Joseph Maxfield, surviving partners of the firm of N. Sturtevant & Company, on promissory notes indorsed by the firm. John Borrowscale was summoned as trustee of the defendants. Writ dated June 6, 1865.

The case, as it appeared from the answer of the trustee and an agreed statement of facts, upon which it was submitted to the judgment of the Superior Court, was as follows : —

The firm of N. Sturtevant & Company was composed of the defendants, both of whom were domiciled in Philadelphia in the Commonwealth of Pennsylvania, and were citizens of Pennsylvania, and of Noah Sturtevant, who was domiciled in Boston and was a citizen of Massachusetts. The firm did business both in Philadelphia and Boston.

The following indenture was executed on the day of its date. [The substance of the indenture was a conveyance by N. Sturtevant & Company, and by each member of the firm, of all their property to Joseph A. Clay of Philadelphia, for the benefit of their creditors.]

It was agreed by the parties “ that general assignments by debtors for the benefit of their creditors were recognized by the law of Pennsylvania at the time the assignment in this case was made, by an act of the Assembly of Pennsylvania of June 14, 1836 ; that by subsequent acts all preferences in such assignments, except for wages of labor to a limited amount, are avoided, and the assignments enure to the benefit of all the creditors equally, with the above exception, so far as the laws of Pennsylvania have force ; that the assignment of October 25, 1861, to Clay, was general and without preferences, so far as the laws

¹ Followed in case of a lunatic residing abroad, though domiciled in England. *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666. — ED.

of Pennsylvania have force, and conformable to the laws of Pennsylvania; that Clay, the assignee, filed his first account November 17, 1863; that it was referred to John N. Campbell, a master, for audit and distribution; that claims of creditors were proved prior to April 14, 1864, to the amount of \$412,027.18; that Campbell filed his report on that day, and declared a dividend of $3\frac{1}{10}$ per cent, which has been paid as demanded; that on December 30, 1864, Campbell filed a supplementary report, admitting a claim of \$2,645.37, to a dividend, and some small claims were proved afterwards; that Clay subsequently filed his second account, exhibiting a balance of \$11,613.77, which, with some little accrued interest, will suffice for a further dividend of between two and three per cent; that there is an apparently hopeless claim against a bankrupt estate still outstanding, but nothing else recoverable by the assignee, unless the claim in the present case can be enforced; that by the laws of Pennsylvania creditors only recognize the assignment by proving their claims and accepting dividends, as they have done in this case to the extent above mentioned, and they have no remedy against the assigned property except this; and that no judgment or execution binds or can be levied on the estate after the assignment, and the assignment is valid against them in every way, so far as the laws of Pennsylvania have force."

Borrowscale, who was a citizen of Massachusetts, was employed by Clay, assignee, under the laws of Pennsylvania, of the firm of N. Sturtevant & Company, to collect certain amounts due that firm; and he did collect certain sums, of which he paid over part to Clay, and held the balance in his hands at the time when he was summoned as trustee.

The plaintiff was a citizen of Massachusetts, domiciled there at the time of the assignments to Clay and of the bringing of this suit, and also at the time of the making of the notes sued on, which were made and delivered in Massachusetts; and the plaintiff never proved his claim under the assignments to Clay, or in any manner recognized or assented to the said assignments, or to the action of Clay under the same, or to the doings of the other creditors in regard to said assignments. Noah Sturtevant died before this action was brought.

The Superior Court discharged the trustee, and the plaintiff appealed.

WELLS, J. The St. of 1836, c. 238, having been repealed, this case is not affected by any considerations arising from that statute, or from the general policy of the insolvent laws of Massachusetts. *National Mechanics' & Traders' Bank v. Eagle Sugar Refinery*, 109 Mass. 38.

Independently of those laws, it has always been held that voluntary assignments by a debtor, in trust for the payment of debts, and without other adequate consideration, are invalid as against attachment, except so far as assented to by the creditors for whose benefit they were made. If assented to by creditors, such assignments are good at common law, and will protect the property or fund from attachment to the extent of the amount due to creditors thus assenting; unless, by

the conditions of the assignment, it is made to take effect only upon the assent of all, or a prescribed number of creditors.

The assent of creditors will not be presumed on the ground that it is apparently for their interest; but must be shown by some form of adoption or affirmative acquiescence. *Russell v. Woodward*, 10 Pick. 408, 413.

In cases of assignment by a tripartite instrument, it is generally necessary that creditors should execute the instrument in order to give it full effect, because such is the intent with which it is made. But when this is not required by the form of the instrument of assignment, it is only necessary that creditors should give such assent to its provisions as will recognize and affirm the acceptance and possession of the property by the assignee, as made and held for their benefit and in their behalf, in accordance with the terms of the assignment. *Russell v. Woodward*, 10 Pick. 408; *Everett v. Walcott*, 15 Pick. 94.

If creditors present their claims to the trustees for allowance for the purpose of a distribution, in accordance with the terms of the assignment, they thereby assent to the trust; and the trustee thereafter holding the property in their behalf holds it upon a legal consideration, and his title is perfected. The effect is the same if they present their claims to commissioners or other persons appointed for that purpose, in accordance with the terms of the assignment. And it can make no difference, in this particular, if those persons are appointed under provisions of local public law, with reference to which the instrument of assignment was made.

The foregoing propositions meet and cover the present case. The assignment was made with reference to the laws of Pennsylvania. It is agreed that, by those laws, such an assignment is recognized as valid; and the proof and allowance of claims, and the distribution, are conducted as judicial proceedings. Creditors, to an amount largely exceeding the total assets, have presented and proved their claims and accepted dividends upon them, thereby signifying their adoption of the assignment for their benefit.

The question is made how far the courts of this Commonwealth are bound to recognize assignments of this kind, made in a foreign jurisdiction, when set up against our own citizens claiming to hold, by attachment, property of the insolvent debtor found within this jurisdiction.

Such assignments made by commissioners of bankruptcy, or by judicial or legislative authority merely, without the act and assent of the debtor, are not held as binding upon the courts of another State. *Taylor v. Columbian Ins. Co.*, 14 Allen, 353.

An assignment made by the debtor himself in another State, which, if made here, would be set aside for want of consideration or delivery, or as fraudulent, or contravening the policy of the law of this Commonwealth, will not be sustained here against an attachment, although valid in the State or country where made. *Zipcey v. Thompson*,

1 Gray, 243; Fall River Iron Works Co. v. Croade, 15 Pick. 11; Ingraham v. Geyer, 13 Mass. 146; Osborn v. Adams, 18 Pick. 245.

In each case above mentioned, to sustain the assignment would be to give force and effect here to the foreign law, which has none *suo vigore*. That is a matter of comity, and not of right. But in each case the assignment is always sustained so far as it affects property which was at the time within the jurisdiction where it was made: Benedict v. Parmenter, 13 Gray, 88; Wales v. Alden, 22 Pick. 245; and also against all citizens of that jurisdiction, even when seeking a remedy here against property found here. Rhode Island Central Bank v. Danforth, 14 Gray, 123; Martin v. Potter, 11 Gray, 37; Richardson v. Forepaugh, 7 Gray, 546; Whipple v. Thayer, 16 Pick. 25; Daniels v. Willard, Ib. 36.

This assignment is made by the debtors themselves. No fraud is shown or suggested. It in no respect contravenes the policy of law as established in this Commonwealth. It is assented to by creditors sufficiently to give it a valid consideration and full legal effect, if it had been made here. The effect of that assent does not depend at all upon the judicial proceedings in Pennsylvania. Giving no force whatever to the judicial authority of those proceedings, or to the local law, we find in the acts of the parties sufficient to constitute a legal and valid assignment, which should be held to be good wherever made, and effectual to pass the rights of the debtors even to property not subject to the local laws of Pennsylvania. Means v. Hapgood, 19 Pick. 105; Newman v. Bagley, 16 Pick. 570. The judgment therefore must be

*Trustee discharged.*¹

BARNETT v. KINNEY.

SUPREME COURT OF THE UNITED STATES. 1893.

[Reported 147 United States, 476.]

APPEAL from the Supreme Court of the Territory of Idaho. Action of replevin to recover possession of certain goods and chattels. On November 23, 1887, one Lipman, a citizen of Utah, had conveyed the property in question, with other property in Utah, to Barnett, for the

¹ *Acc.* J. M. Atherton Co. v. Ives, 20 Fed. 894; Schroder v. Tompkins, 58 Fed. 672; Campbell v. Colorado C. & I. Co., 9 Col. 60, 10 Pac. 248; First Nat. Bank v. Walker, 61 Conn. 154, 23 Atl. 696; Walters v. Whitlock, 9 Fla. 86; Princeton Mfg. Co. v. White, 68 Ga. 96; Coflin v. Kelling, 83 Ky. 649; *In re* Paige & Sexsmith Lumber Co., 31 Minn. 136, 16 N. W. 700; Toof v. Miller, 73 Miss. 756, 19 So. 577; Askew v. La Cygne Bank, 83 Mo. 366; Frazer v. Fredericks, 24 N. J. L. 162; Ockerman v. Cross, 54 N. Y. 29; Johnson v. Sharp, 31 Oh. S. 611; Smith's Appeal, 104 Pa. 381; Noble v. Smith, 6 R. I. 446; Weider v. Maddox, 66 Tex. 372, 1 S. W. 168; Gregg v. Sloan, 76 Va. 497; Harrison v. Farmers' Bank, 9 W. Va. 424; Cook v. Van Horn, 81 Wis. 291, 50 N. W. 893. — Ed.

benefit of the creditors of Lipman, with preferences to certain creditors. On November 25, 1887, Barnett, as assignee, took actual possession of the personal property situated in Idaho, and on November 26, and before the property was taken by Kinney, filed the assignment for record in the proper office. Kinney had actual notice. The assignment was valid by the laws of Utah. Lipman was indebted to the St. Paul Knitting Works, a corporation organized under the laws of Minnesota, and on November 26, 1887, while Barnett was in actual possession, Kinney, who was sheriff of the county, under a writ of attachment in favor of that corporation and against Lipman, took possession of the property; and thereupon this action of replevin was commenced and the possession of the property delivered to Barnett, who had sold the same and retained the proceeds subject to the final disposition of the action. Judgment was given in the territorial court in favor of the defendant, and the case was brought by appeal to this court.¹

FULLER, C. J. The Supreme Court of the Territory held that a non-resident could not make an assignment, with preferences, of personal property situated in Idaho, that would be valid as against a non-resident attaching creditor, the latter being entitled to the same rights as a citizen of Idaho; that the recognition by one State of the laws of another State governing the transfer of property rested on the principle of comity, which always yielded when the policy of the State where the property was located had prescribed a different rule of transfer from that of the domicil of the owner; that this assignment was contrary to the statutes and the settled policy of Idaho, in that it provided for preferences; that the fact that the assignee had taken and was in possession of the property could not affect the result; and that the distinction between a voluntary and an involuntary assignment was entitled to no consideration.

Undoubtedly there is some conflict of authority on the question as to how far the transfer of personal property by assignment or sale, lawfully made in the country of the domicil of the owner, will be held to be valid in the courts of another country, where the property is situated and a different local rule prevails.

We had occasion to consider this subject somewhat in *Cole v. Cunningham*, 133 U. S. 107, 129, and it was there said: "Great contrariety of State decision exists upon this general topic, and it may be fairly stated that, as between citizens of the State of the forum, and the assignee appointed under the laws of another State, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own State and the State of the debtor, the laws of such State will ordinarily be applied in the State of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the States, the fact that the assignee claims under a decree of a court

¹ This statement is condensed from the opinion of Mr. Chief Justice FULLER. — ED.

or by virtue of the law of the State of the domicile of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the State in which the law was passed. This is a reason which applies to citizens of the actual situs of the property when that is elsewhere than at the domicile of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance."

We have here a voluntary transfer of his property by a citizen of Utah for the payment of his debts, with preferences, which transfer was valid in Utah, where made, and was consummated by the delivery of the property in Idaho, where it was situated, and then taken on an attachment in favor of a creditor not a resident or citizen of Idaho. Was there anything in the statutes or established policy of Idaho invalidating such transfer?

Title XII of Part Second of the Revised Statutes of the Territory of Idaho, entitled "Of proceedings in insolvency" (Rev. Stats. Idaho, §§ 5875 to 5932), provided that "no assignment of any insolvent debtor, otherwise than as provided in this title, is legal or binding on creditors;" that creditors should share pro rata, "without priority or preference whatever;" for the discharge of the insolvent debtor upon compliance with the provisions of the title, by application for such discharge by petition to the District Court of the county in which he had resided for six months next preceding, with schedule and inventory annexed, giving a true statement of debts and liabilities and a description of all the insolvent's estate, including his homestead, if any, and all property exempt by law from execution. The act applied to corporations and partnerships, and declared that if the partners resided in different counties, that court in which the petition was first filed should retain jurisdiction over the case. Nothing is clearer from its various provisions than that the statute had reference only to domestic insolvents. As pointed out by Judge Berry in his dissenting opinion, the first section of the fifty-eight upon this subject, in providing that "every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and liabilities," demonstrates this. The legislature of Idaho certainly did not attempt to discharge citizens of other jurisdictions from their liabilities, nor intend that personal property in Idaho, belonging to citizens of other States or Territories, could not be applied to the payment of their debts unless they acquired a six months' residence in some county of Idaho, and went through its insolvency court.

The instrument in controversy did not purport to be executed under any statute, but was an ordinary common law assignment with preferences, and as such was not, in itself, illegal. *Jewell v. Knight*, 123 U. S. 426, 434. And it was found as a fact that it was valid under the laws of Utah. While the statute of Idaho prescribed pro rata distribution without preference, in assignments under the statute, it did not otherwise deal with the disposition of his property by a debtor nor prohibit preferences between non-resident debtors and creditors through an assignment valid by the laws of the debtor's domicile. No just rule required the courts of Idaho, at the instance of a citizen of another State, to adjudge a transfer, valid at common law and by the law of the place where it was made, to be invalid, because preferring creditors elsewhere, and, therefore, in contravention of the Idaho statute and the public policy therein indicated in respect of its own citizens, proceeding thereunder. The law of the situs was not incompatible with the law of the domicile.

In *Halsted v. Straus*, 32 Fed. Rep. 279, 280, which was an action in New Jersey involving an attachment there by a New York creditor as against the voluntary assignee of a New York firm, the property in dispute being an indebtedness of one Straus, a resident of New Jersey, to the firm, Mr. Justice Bradley remarked: "It is true that the statute of New Jersey declares that assignments in trust for the benefit of creditors shall be for their equal benefit, in proportion to their several demands, and that all preferences shall be deemed fraudulent and void. But this law applies only to New Jersey assignments, and not to those made in other States, which affect property or creditors in New Jersey. It has been distinctly held by the courts of New Jersey that a voluntary assignment made by a non-resident debtor, which is valid by the law of the place where made, cannot be impeached in New Jersey, with regard to property situated there, by non-resident debtors. *Bentley v. Whittemore*, 4. C. E. Greene (19 N. J. Eq.), 462; *Moore v. Bonnell*, 2 Vroom (31 N. J. Law), 90. The execution of foreign assignments in New Jersey will be enforced by its courts as a matter of comity, except when it would injure its own citizens; then it will not. If *Deering, Milliken & Co.* were a New Jersey firm they could successfully resist the execution of the assignment in this case. But they are not; they are a New York firm. New York is their business residence and domicile. The mere fact that one of the partners resides in New Jersey cannot alter the case. The New Jersey courts, in carrying out the policy of its statute for the protection of its citizens, by refusing to carry into effect a valid foreign assignment, will be governed by reasonable rules of general jurisprudence; and it seems to me that to refuse validity to the assignment in the present case, would be unreasonable and uncalled for."

In *May v. First National Bank*, 122 Ill. 551, 556, the Supreme Court of Illinois held that the provision in the statute of that State prohibiting all preferences in assignments by debtors applied only to those

made in the State, and not to those made in other States; that the statute concerned only domestic assignments and domestic creditors; and the court, in reference to the contention that, if not against the terms, the assignment was against the policy of the statute, said: "An assignment giving preferences, though made without the State, might as against creditors residing in this State, with some reason, be claimed to be invalid, as being against the policy of the statute in respect of domestic creditors — that it was the policy of the law that there should be an equal distribution in respect to them. But as the statute has no application to assignments made without the State, we cannot see that there is any policy of the law which can be said to exist with respect to such assignments, or with respect to foreign creditors, and why non-residents are not left free to execute voluntary assignments, with or without preferences, among foreign creditors, as they may see fit, so long as domestic creditors are not affected thereby, without objection lying to such assignments that they are against the policy of our law. The statute was not made for the regulation of foreign assignments, or for the distribution, under such assignments, of a debtor's property among foreign creditors."

In *Frank v. Bobbitt*, 155 Mass. 112, a voluntary assignment made in North Carolina and valid there, was held valid and enforced in Massachusetts as against a subsequent attaching creditor of the assignors, resident in still another State, and not a party to the assignment. The Supreme Judicial Court observed that the assignment was a voluntary and not a statutory one; that the attaching creditors were not resident in Massachusetts; that at common law in that State an assignment for the benefit of creditors which created preferences was not void for that reason; and that there was no statute which rendered invalid such an assignment when made by parties living in another State, and affecting property in Massachusetts, citing *Train v. Kendall*, 137 Mass. 366. Referring to the general rule that a contract, valid by the law of the place where made, would be regarded as valid elsewhere, and stating that "it is not necessary to inquire whether this rule rests on the comity which prevails between different States and countries, or is a recognition of the general right which every one has to dispose of his property or to contract concerning it as he chooses," the court said that the only qualification annexed to voluntary assignments made by debtors living in another State had been "that this court would not sustain them if to do so would be prejudicial to the interests of our own citizens or opposed to public policy." And added: "As to the claim of the plaintiffs that they should stand as well as if they were citizens of this State, it may be said, in the first place, that the qualification attached to foreign assignments is in favor of our own citizens as such, and in the next place, that the assignment being valid by the law of the place where it was made, and not adverse to the interests of our citizens, nor opposed to public policy, no cause appears for pronouncing it invalid." And see, among numerous cases to the same effect, *Butler v. Wendell*,

57 Mich. 62; Receiver v. First National Bank, 7 Stew. (34 N. J. Eq.) 450; Egbert v. Baker, 58 Conn. 319; Chafee v. Fourth National Bank of New York, 71 Me. 514; Ockerman v. Cross, 54 N. Y. 29; Weider v. Maddox, 86 Tex. 372; Thurston v. Rosenfield, 42 Mo. 474.

We do not regard our decision in *Green v. Van Buskirk*, 5 Wall. 307, 7 Wall. 139, as to the contrary. That case was fully considered in *Cole v. Cunningham*, *supra*, and need not be re-examined. The controversy was between two creditors of the owner of personalty in Illinois, one of them having obtained judgment in a suit in which the property was attached and the other claiming under a chattel mortgage. By the Illinois statute such a mortgage was void as against third persons, unless acknowledged and recorded as provided, or unless the property was delivered to and remained with the mortgagee, and the mortgage in that case was not acknowledged and recorded, nor had possession been taken. All parties were citizens of New York, but that fact was not considered sufficient to overcome the distinctively politic and coercive law of Illinois.

In our judgment, the Idaho statute was inapplicable and the assignment was in contravention of no settled policy of that Territory. It was valid at common law, and valid in Utah, and the assignee having taken possession before the attachment issued, the District Court was right in the conclusions of law at which it arrived.

The judgment is reversed and the cause remanded to the Supreme Court of the State of Idaho for further proceedings not inconsistent with this opinion.

*Judgment reversed.*¹

GUILLANDER v. HOWELL.

COURT OF APPEALS, NEW YORK. 1866.

[Reported 35 New York, 657.]

ACTION for the detention and conversion of some boilers. A firm of Boardman & Co., residing and doing business in the city of New York, failed in December, 1857, and then in that city made a general assignment to the plaintiff, then a resident of said city, for the benefit of their creditors, giving preferences. The assignors then had some steam boilers in New Jersey, which had been manufactured for them by the defendants, and for which they were then indebted to the defendants. After the assignment, the defendants, residents of New Jersey, sold

¹ *Acc.* Train v. Kendall, 137 Mass. 366 (but see Zipcey v. Thompson, 1 Gray 243); Frank v. Bobbitt, 155 Mass. 112, 29 N. E. 209; Butler v. Wendell, 57 Mich. 62, 23 N. W. 460; Williams v. Kemper, Hundley & McDonald D. G. Co., 4 Okl. 145, 43 Pac. 1148; Smith's Appeal, 117 Pa. 30, 11 Atl. 394. — ED.

the steam boilers under proceedings commenced by foreign attachment against the assignors in New Jersey to satisfy said demand. Plaintiff demanded the boilers and defendants refused to deliver them. It appeared on the trial that an assignment giving preferences was void in New Jersey by the laws of that State. Verdict for defendants, affirmed at the General Term of the Supreme Court in the First District, and the plaintiff appeals.

PECKHAM, J. The point is here distinctly presented, and it is the only point in the case, whether a sale in New York, legal there, of chattels situate in New Jersey is valid in the latter State as against creditors of the assignors residing there, when it is void by the laws thereof.

It is a general rule in regard to personal property, that it has no situs, but follows the person of the owner. It is, therefore, governed in its transfer and disposition by the law of the domicile of its owner, that is, by the law of the place where the sale is made, without regard to the law of the locality where it may be actually situated, so that if a sale be valid where made, it is valid everywhere. Story's Conf. of Laws, §§ 379, 383, 384, &c.; *Warren v. Van Buskirk*, 13 Abbott's Pr. R., affirmed in this court in December, 1865; opinion by Justice Potter. If that be the universal rule, the plaintiff in the case is of course entitled to recover.

But certain exceptions are stated in the books, which seem to be as well sustained as the rule itself. One exception is that such sale is not valid in another State, where the property is in fact situate, if it conflict with the interests of that State or its citizens.

Huberus lays down three maxims in reference to the transfer of property, and the effect of such transfer under different governments. 1. "The laws of every empire have force within the limits of that government, and are obligatory upon all within its bounds. 2. All persons within the limits of a government are considered as subjects, whether their residence is permanent or temporary. 3. By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of the other government or their citizens." Quoted in a note to 3 Dallas, 370.

Justice Cowen, when reporter, regarded the rule settled by the cases to be, "that the law of a place, where the contract is made or to be performed, is to govern as to the nature, validity, construction, and effect of such contract, and, being valid in such place, it is to be considered valid and enforced everywhere, with the exception of cases in which the contract is immoral or unjust, or in which the enforcing it in a State would be injurious to the rights, the interest, or convenience of such State or its citizens," and cites many cases. *Andrews v. Herriot*, 4 Cow. 510., in note at 511.

Judge Story, after stating that personal property, by the law of England, has no locality, but must be governed by the law of the

domicil of its owner (Story's Conf. Laws, §§ 330, 331), and that foreign jurists, whom he cites, affirm the same doctrine, states the exception to the rule substantially as before expressed, as adjudged in different States in this country, and adds: "No one can seriously doubt that it is competent for any State to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its own territorial limits; nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or a selfish policy." *Id.* § 390.

What is injurious to the rights of the citizens where the property is situate, should be the subject of positive legislation, and not left to the discretion of the courts (*id.* § 390), and so are the authorities generally, in the several States, although the rule is sometimes more broadly expressed. *Zipcey v. Thompson*, 1 Gray [Mass.], 243; *Varnum v. Camp*, 1 Green [N. J.], 326; *Ingraham v. Geyer*, 13 Mass. 145; *Le Roy v. Crowninshield*, 2 Mason, 157; *Fox v. Adams*, 5 Greenl. [Me.] 245; *Oliver v. Townes*, 14 Martin [La.], 97; 2 Cond. R. S. C. [La.] 606. A well considered case. So in Virginia and Kentucky (says Chancellor Kent), under their statute laws, all real and personal property within the State are held to be bound by the attachment laws of the State, though the owner should execute an instrument in control of it at his domicil abroad. The rule of courtesy is held to be overruled by positive law." 2 Kent, 407; *Bishop v. Holcomb*, 10 Conn. 444. Such, I believe, is the rule of law in all of the States where the point has been adjudicated, except, perhaps, South Carolina. The case referred to, as an authority in South Carolina, of *Green v. Mowry* (2 Bailey, 163), I have not been able to find, except a statement of its decision, in a note in 2 Kent, 408. Whether it applied to movables or to a chose in action is not stated.

The exception is fully recognized by Lord Loughborough, in *Sill v. Warwick* (1 H. Bl. at 693), and by the reporter in giving the course of reasoning of the judges in the exchequer chamber in *Philips v. Hunter* (2 H. Bl. at p. 405).

The two last were cases under the bankrupt laws, which it is now generally held in this country do not operate extraterritorially. But in the case at bar, it is a question of a conflict of laws. By the law of New York the sale is valid, by that of New Jersey it is void as to creditors. The law of this State is of course invalid as a mere law in New Jersey. It cannot operate there except by comity or courtesy, and as to property actually situate in New Jersey, that State has the conceded right to legislate; she may declare what alone shall transfer the title as against her citizens, creditors of the assignor. The property is within her exclusive jurisdiction: she protects and regulates it; though we may differ as to the policy or principles of her laws, we must admit their validity. In all the books it is conceded that real property must be transferred according to the law

of its locality, because it is subject to the exclusive jurisdiction of the government of its locality, and because every legal remedy in regard to it must be sought there. This is not a case of priority of title, but of conflicting title. The law of New York holds this sale valid, as to all property which her laws can regulate. Her laws are of no force in New Jersey as laws, but by comity they are enforced as to a transfer of personal property valid here, except when injurious to her citizens there. There is not a decision in this State against this position, although there are some general dicta that would permit a different construction.

If the fact accorded with the fiction and the property were, in fact, within the State when the assignment was made, the title would pass, and it would not be liable to foreign attachment, though afterward found in New Jersey.

This court, in *Warren v. Van Buskirk*, *supra*, has held that this action would lie, if the defendants had been residents of our State when the assignment was made, and, therefore, subject to its laws. So are the decisions generally in other States. (*Bullock v. Taylor*, 16 Pick, 336.)

The Supreme Court in the Third District at General Term, lately held that the exception did not extend to a debt due from a resident in Connecticut to a resident of this State—but that an assignment thereof valid here, though invalid there by her laws, ought to be held valid there also, even as against residents of Connecticut—because a debt is not a *corpus* capable of local position, but merely a *jus incorporate*. *Thurman v. Stockwell*, decided in 1865.

This is sustained by two other decisions of precisely the same character. In *Speed v. May* (17 Penn. State, 91) it was held that an assignment of a chose in action, due from a resident of Pennsylvania, legally made in Maryland, was valid in Pennsylvania, although the general assignment, which included the claim, was not recorded as required by the law of the latter State.

So in *Caskie v. Webster* (2 Wal. Jr. 131), Mr. Justice Grier made a like decision. *Thurman v. Stockwell* made a distinction between debts and movables.

In *Caskie v. Webster*, assignee, the judge remarked: "A debt is a mere incorporeal right. It has no situs and follows the person of the owner." But he did not base his decision on that distinction. In a very brief opinion, he seemed impliedly to admit that the law was against his decision as to personal property as between different nations, but he did "not think that the different States of this Union are to be regarded as a general thing in the relation of States foreign to each other." With deference, I think the doctrine on this subject to be well established the other way. See cases before cited, and *Hoyt v. Thompson*, 19 N. Y. 602; *Leinman v. The People*, 20 N. Y. 602.

This court has recognized the distinction as to a situs between debts and movables. The latter being capable of having a situs, not the former, as they follow the domicile of the owner. *People v. Commissioners of Taxes*, 23 N. Y. 224.

It is insisted that great embarrassment will occur if a transfer of movables must be made according to the law of its situs, as it is not expected that persons will know the laws of a foreign country. This difficulty is rather imaginary than real. The transfer is always held valid for all general purposes, with the exception before stated. There would seem to be no great injustice in holding that movables in one State, which have probably been a ground of their owners obtaining credit there, should not be transferred to another State to pay foreign debts, leaving local debts unpaid, unless it be done in accordance with the law of their locality.

I know of no decisions anywhere that would sustain this action. The cases before cited of *Thurman v. Stockwell*, *Speed v. May*, and *Carkie v. Webster*, are, I think, sound law. A chose in action cannot surely be said to have any actual situs in the place where the debtor resides — as a general principle it is payable at the residence of the creditor, if not expressed otherwise, and a tender to be good must be made to the creditor. There would seem, therefore, to be no sound basis for the debtor's State, to legislate exclusively as to the legality of a transfer of that debt, made by a foreign creditor. In such case, as in all others, where the property transferred does not actually lie within the jurisdiction of another government, a sale or a contract, valid where made, is valid everywhere.¹

The exception that the contract cannot be enforced if it be immoral or unjust, will and should be rarely, if ever, heeded between civilized nations.

Every civilized nation should be the sole and exclusive judge of what is moral and just in her legislation upon matters conceded to be within her exclusive jurisdiction.

This State has forbidden the taking of more than at the rate of seven per cent interest by the severest penalties. Lotteries, though once allowed for literary or religious purposes, are now declared a nuisance. So of slavery, once sustained but now prohibited in every State in the Union. Yet, a note given for slaves or lottery tickets, or usurious by our law, if made here, if valid by the laws of the country where made and payable, would be sustained here.

It would, I admit, be more harmonious with the general principle that personal property has no situs, and practically, perhaps, more convenient to hold that a sale of movables, valid where made, should be valid everywhere.

¹ *Acc. Caskie v. Webster*, 2 Wall. Jr. 131; *Egbert v. Baker*, 58 Conn. 319, 20 Atl. 466; *Birdseye v. Baker*, 82 Ga. 142, 7 S. E. 863. *In re Dalpay*, 41 Minn. 532, 43 N. W. 564. *Contra*, *Kimball v. Plant*, 14 La. 10; *Zipey v. Thompson*, 1 Gray, 243; *Martin v. Potter*, 34 Vt. 87. — ED.

But, in addition to the objections thereto already stated, suppose the laws of the States differ, as they sometimes do, as to what is personal and what is real property, could it be pretended that a sale here without deed of what our law calls personal, and the law of New Jersey declares to be real estate actually located there, would pass the title to the property there?

Whatever may be our views as to what the law ought to be in cases like the one at bar, the decisions harmonizing, too, with elementary writers, are too uniform and too numerous to warrant us in overruling them. Should we do so and hold the defendant responsible in this case, we should be in antagonism with nearly every State in the Union — if not with all, upon a question, too, which each State has the right to decide for itself and generally to enforce its decision, and as a general thing our decision the other way would remain a lifeless rule, without our having the least power to enforce it.

We think the judgment should be affirmed.

DAVIES, Ch. J., and PORTER, J., dissented; all the other judges concurring.

*Judgment affirmed.*¹

WHIPPLE v. THAYER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1834.

[Reported 16 *Pickering*, 25.]

THIS was an action of replevin, brought by the plaintiff, as the assignee of David Wilkinson, against the defendant, who was a deputy sheriff.

By an agreed statement of facts it appeared that on July 20, 1829, the property in question, consisting of fifteen bales of cotton of the value of \$550, and being then on its way from Providence in Rhode Island, to Wilkinson's factory at Wilkinsonville, in this Commonwealth, was attached on board of a canal boat and detained by the defendant, on a writ in favor of one Beckwith against Wilkinson; that by this

¹ *Acc. Richmondville Mfg. Co. v. Prall*, 9 Conn. 487; *Stricker v. Tinkham*, 35 Ga. 176; *In re Dalpay*, 41 Minn. 532, 43 N. W. 564.

So generally, though an assignment of personal property for the benefit of creditors is valid by the law of the place of assignment and of the domicile of the assignor, it will not prevail against subsequent attachment by the assignor's creditors of personal property situated at the time of the assignment in a State by the laws of which the assignment was for any reason invalid. *King v. Johnson*, 5 Harr. (Del.) 31; *Kansas City Packing Co. v. Hoover*, 1 App. D. C. 268; *Woolson v. Pipher*, 100 Ind. 306; *Franzen v. Hutchinson*, 94 Ia. 95, 62 N. W. 690; *Brown v. Knox*, 6 Mo. 302; *Varnum v. Camp*, 13 N. J. L. 326; *Pierce v. O'Brien*, 129 Mass. 314; *Rice v. Courtis*, 32 Vt. 460. But see *Livermore v. Jenckes*, 21 How. 126; *Speed v. May*, 17 Pa. 91; *Crampton v. Valido Marble Co.*, 60 Vt. 291. — Ed.

writ, the defendant was directed to attach to the value of \$600; that on the 23d day of the same July, Wilkinson, by two several bipartite instruments, assigned all his property, real and personal, to the plaintiff, in trust for the benefit of his creditors, but that the creditors did not signify their assent to the assignment by becoming parties to it; that on August 1, 1829, the defendant returned the cotton as again attached, (subject to the first attachment,) at the suit of Harkness & Stead against Hezekiah Howe and Wilkinson, who were partners; that the claim of Harkness & Stead amounted to the sum of \$30, and the defendant was directed to attach to the amount of \$60; that the defendant knew of the failure of Wilkinson previously to the second attachment, but had no knowledge of the assignment except from common report; that at the time of the first attachment and of the assignment, the cotton was the sole property of Wilkinson; that in the interim between these attachments, the plaintiff agreed verbally to settle the demand of Beckwith, but did not actually pay the same until after the second attachment; that the defendant was informed of this agreement, but was in no other way discharged from his responsibility; that on the 12th day of the same August, the plaintiff having paid the claim of Beckwith, demanded the cotton of the defendant, who refused to deliver the same; and that thereupon this action was commenced.

It further appeared that Wilkinson was insolvent, not having property sufficient to pay his private debts; that his property was in several different States of the Union; that the plaintiff took possession thereof as soon as he conveniently could; but that he took no other possession of the cotton in question, than such as resulted from the facts above stated.

Howe was a citizen of this Commonwealth. The plaintiff, Wilkinson, Harkness, and Stead, were all citizens of Rhode Island; and by the laws of that State, the assignment of Wilkinson vested the property in his assignee, so that it could not be attached by his creditors.

If, upon these facts, the action could be maintained, the plaintiff was to have his costs; otherwise, judgment was to be entered for the defendant.¹

SHAW, C. J. The only objection made to the assignment relied on by the plaintiff is, that it was a trust assignment by an insolvent debtor, providing for a distribution of his property among his creditors, and it not appearing that the creditors had signified their assent by becoming parties to it, by the laws of our own State it is not to be considered valid against an attaching creditor. Without at present deciding the more general question, whether this assignment, made by the owner of property, in a mode conformable to the laws of the place of his domicile, would be good against a subsequent attachment, made by a citizen of this State, the court are all of opinion that as against a citizen of Rhode Island, the assignment was good, and therefore, that the de-

¹ Arguments of counsel, and part of the opinion, in which the necessity of possession by the assignee was discussed, are omitted. — Ed.

fendant could not justify his refusal to deliver the goods to the plaintiff, the assignee under his attachment in behalf of Harkness & Stead, citizens of Rhode Island, and that the plaintiff is entitled to hold the goods.¹

HEYER v. ALEXANDER.

SUPREME COURT OF ILLINOIS. 1884.

[Reported 108 *Illinois*, 385.]

WALKER, J.² Defendants in error brought an action of assumpsit in the St. Clair Circuit Court against Ottomar W. Heyer, who resided in Missouri, and also sued out a writ of attachment in aid. On the 2d of December, 1882, the writ was levied on a piece of ground in East St. Louis, on which defendant had a lease for ten years. On this piece of ground defendant had a glucose factory, and, connected with it, material and other personal property. On the next day the writ was also levied on a portion of this personal property in the factory building, but it was not removed from the building. On the 28th day of November, Dank Brothers & Co. had caused an attachment against Heyer to be levied on this lot and a portion of the personal property, and a custodian was placed in possession of the property in the building, and it was not removed therefrom. On the 29th of November, Heyer made an assignment of his property for the benefit of his creditors. The assignment was made in Missouri, under the laws of that State, and it is not denied that it conformed to the requirements of those laws. It was recorded in St. Louis, and on the 3d of December following it was recorded in St. Clair County, in this State. The trust deed purports to convey the grantor's right, title, and interest "in and to all of the real estate, lands, tenements, personalty, goods, chattels, moneys, choses in action, accounts, notes, property of every kind, nature, and description whatever, and wherever situated," excepting property exempt from execution under the laws of Missouri. On the 29th of November the assignee, Muench, appointed P. B. Fenske agent, to

¹ *Acc. Matthews v. Lloyd*, 89 Ky. 625, 13 S. W. 106; *Richardson v. Leavitt*, 1 La. Ann. 430 (see *Beirne v. Patton*, 17 La. 589); *Pomroy v. Lyman*, 10 All. 468 (see *Faulkner v. Hyman*, 142 Mass. 53); *Hoag v. Hunt*, 21 N. H. 106; *Moore v. Bonnell*, 31 N. J. L. 90; *Hunt v. Lathrop*, 7 R. I. 58; *contra*, *Sheldon v. Blauvelt*, 29 S. O. 453, 7 S. E. 593. So the assignor or a creditor who has assented to the assignment cannot claim the property as against the assignee. *Perley v. Mason*, 64 N. H. 6, 3 Atl. 629; *Thompson v. Fry*, 51 Hun, 296, 4 N. Y. Supp. 166; *Teetor v. Robinson*, 7 S. & R. 182.

The New Hampshire doctrine may be found in *Sanderson v. Bradford*, 10 N. H. 260; *Hall v. Boardman*, 14 N. H. 33; *Carbee v. Mason*, 64 N. H. 10, 4 Atl. 791. — Ed.

² Part of the opinion is omitted. — Ed.

take possession for him of all of Heyer's property in this State. This appointment was in writing. He, on the same day, wrote to the sheriff of St. Clair County, notifying him that he had been appointed assignee, and the notice was received by the sheriff before the levy was made by him on the 2d of December. Fenske, on the 29th of November, went to the factory in East St. Louis, and employed Bauer, Heyer's superintendent, to keep the factory and property for Muench until further orders. The custodian placed in charge of the property on the 28th of November remained in charge of the property, and Bauer claimed possession of the property after the 29th of the month. It is claimed that Taussig, one of the plaintiffs in the attachment, who levied on the leasehold interest on the 2d, and the personal property on the 3d, of December, had notice of the assignment before suing out the writ of attachment. The first levy, under the Dank attachment, only embraced a part of the personal property. Soon after the levy the sheriff sold a part of the property levied on, as perishable, and on the 5th of January, 1882, the balance was sold, under an order of the St. Louis Circuit Court, and the sale was approved. The purchaser sold the property to the St. Louis Syrup, Glucose and Grape Sugar Company. Muench, the trustee, and that company, filed interpleaders, each claiming all the property levied on, and issues were formed. The interpleaders moved the court for a separate trial, but the court denied the motion. A trial was had by the court without a jury, by consent, and the court found the property subject to the attachment. This was at the February term. Motions for a new trial were entered, which were overruled at the May term, and a personal judgment was rendered in favor of plaintiff for \$902.56, against defendant, with an order for a special execution for the sale of the real estate levied on under the attachment, but no order was made as to the personal property.

The court refused to hold the following propositions, asked by the interpleaders, to be the law in the case: —

“On behalf of the interpleaders the court is requested to declare the law to be, that the deed of assignment from Ottomar W. Heyer to Hugo Muench, introduced in evidence, was sufficient to convey to said Muench any real estate, or any interest therein, situate in the State of Illinois, belonging to said Heyer.

“The court is further requested, on behalf of said interpleaders, to declare the law to be, that said deed of assignment from Heyer to Muench was sufficient, if actual possession was taken under it of the real estate involved, before the rights of others attached, to convey to said Muench any real estate, or any interest therein, of said Heyer, situate in the State of Illinois, so as to enable said Muench, or his grantee or grantees, to hold the same against a subsequent attaching creditor having notice of said conveyance.

“The court is further requested, on behalf of said interpleaders, to declare the law to be, that the words of general description contained in said deed from Heyer to Muench were sufficient to convey real

estate, or any interest therein, of said Heyer, situate in the State of Illinois, if the conveyance was otherwise valid."

Plaintiffs in error removed the case on error to the Appellate Court for the Fourth District. On a trial in that court the judgment of the Circuit Court was affirmed, and the case comes to this court, on a certificate under the statute, on error from that court.

Plaintiffs in error urge a reversal on the grounds that the Appellate Court erred in holding that the language of the deed of trust was not sufficient to pass title to property of the grantor situated in this State, as against creditors residing therein; in not reversing because the Circuit Court refused separate trials to the interpleaders; in not making an order disposing of the personal property levied on under the attachment; and in finding the amount due to, and rendering judgment in favor of, defendants in error, at the May term, when the issues were found at the February term. We shall consider the errors in the inverse order of their assignment. . . .

We now come to the consideration of the important and controlling question in the case, — that is, whether the deed of assignment was operative to pass the title to the property as against creditors in this State. It is obvious that neither the statute of Missouri nor a judgment of a court in that State can in the least affect the title or possession of property beyond its territorial limits. We consider that as the settled law beyond all dispute. But the owner of real property in this State, although a citizen of another State, may, under our statute, convey it by conforming to its requirements in the execution of the deed of conveyance.

We shall now consider the question whether the deed of trust operated to pass the title to this leasehold estate beyond the reach of the attachment of the domestic creditors.

There seems to be some confusion growing out of the fact that no distinction is made, in some cases, between assignments made by decree of court and a conveyance by the owner in trust for specified purposes, as, for the payment of his debts. A decree of court appointing an assignee to administer the debtor's property for the benefit of his creditors, whatever its effect in the State where it is rendered, has no extraterritorial effect on the debtor's real estate in another or foreign jurisdiction. But this is not true of conveyances of real estate lying in a different State from the residence of the owner. In all the States of the Union their laws authorize non-residents to convey real estate by conforming to the requirements of their laws. Thus it is seen there is a broad distinction between a foreign decree and a conveyance by a non-resident. Neither a statute nor decree of another State can directly affect titles to land in this State. No doubt a court of chancery may require an owner of lands in a different State to convey them to a person entitled in equity to the property, and when so conveyed, if the laws of the State where the lands are situated are observed, the title would pass. It would, in this case, seem to be clear that the

leasehold estate passed by this deed of assignment, subject to such restrictions as our laws may impose. But after so conveying this estate the grantor declared a trust. The question is, will our laws permit that trust to be unconditionally enforced as against his creditors resident in this State? This conveyance is only valid by the comity between the States, and the same comity in some cases imposes terms upon the conveyance for the protection of the inhabitants of the State where the property to be affected is situated. In some of the States it has been held that a deed of assignment by a non-resident debtor to a trustee for payment of debts will not be enforced against creditors residing in the State where the land is situated. In the case of *Chafee v. Fourth National Bank*, 71 Me. 514, it was held, "that an assignment made by an insolvent debtor in another jurisdiction will not operate upon property in this State so as to defeat the attachment of a creditor residing here. . . . Comity between States is not thus to be extended to the prejudice of our own citizens." The doctrine is that such a conveyance is subject to the claims of resident creditors where the property is located. This we regard as the true rule. It is not just or fair that creditors in this State should be compelled to go to a foreign State to receive a *pro rata* share of the debtor's property, when they perhaps extended credit alone upon the faith of the debtor's property in this State, and to which they looked for payment.

The recognized law, well settled and of uniform application, in reference to the administration of estates, is, that where a foreign administrator or executor takes out new or ancillary letters in another country, the creditors residing in such country must be first paid. . . .

This is the principle that the comity between the States requires that administration be granted to the foreign administrator on the implied condition that the creditors of the State where the property is found shall be first paid from the assets of the foreign deceased debtor. In analogy to this doctrine, a foreign debtor cannot place his property in trust so as to defeat his creditors in the State in which this property is situated. We are not prepared to hold, nor do we decide, that this doctrine applies to any conveyance except an assignment by a debtor for the benefit of his creditors. That is the question presented in this case, and we decide it alone. That the States have the right to discriminate in favor of domestic creditors, and against foreign creditors, was fully recognized by the framers of the federal constitution, and the recognition of the principle was one of the grounds for providing for a general bankrupt act. Had there been such a law in force, no such assignment could have been made.

This case is unlike the case of *Chicago, Milwaukee and St. Paul Ry. Co. v. Keokuk Northern Line Packet Co.*, 108 Ill. 317. In that case the property was personalty, that passed on its sale by delivery, and situated in Missouri, where the receiver was appointed, and the title vested in him by his appointment, and the property was brought temporarily into this State, without any intention of its remaining

permanently. But in this case the property was permanently located in this State, and is still here. It was here when the conveyance was made. In this there is a broad and marked distinction between the two cases. The Circuit Court therefore did not err in refusing to hold the propositions asked by the interpleaders, as the law governing this case.

It is urged that appellee had notice of the deed of assignment before he commenced this suit, or such notice as put him on inquiry. We are precluded by statute from reviewing contraverted facts in cases coming here from the Appellate Court. That was a controverted fact, and the Appellate Court has conclusively determined it, and it is beyond our power to review that fact. But that question is immaterial to this decision.

Perceiving no error in the record, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*¹

MEAD v. DAYTON.

SUPREME COURT OF ERRORS, CONNECTICUT. 1859.

[*Reported 28 Connecticut, 33.*]

TROVER. The plaintiff claimed title to the property in question as the trustee in insolvency of one Joshua Sands. The defendant claimed title under a purchase from the insolvent, a short time before his assignment in insolvency.²

ELLSWORTH, J. Several questions have been made in this case which we need not at length consider; for the main one, if decided for the defendant, as we think it must be, is decisive of the case, and must be fatal to the title of the plaintiff as assignee of Joshua Sands.

On the 19th day of October, 1857, the defendant, a resident of the State of New York, occupying a farm near the line of this State, came into Connecticut to obtain payment of a debt due from said Sands. It

¹ This case is followed in Illinois as to assignments of both personal and real estate. *Sheldon v. Wheeler*, 32 Fed. 773 (N. Dist. Ill.); *Consolidated Tank-Line Co. v. Collier*, 148 Ill. 259, 35 N. E. 756; *Smith v. Lamson*, 184 Ill. 71, 56 N. E. 387. *Acc.* *Chafee v. Fourth Nat. Bank*, 71 Me. 514 (*semble*). The assignment, if not against the public policy of Illinois, is valid as against subsequently attaching foreign creditors. *May v. First Nat. Bank*, 122 Ill. 551, 13 N. E. 806; *Woodward v. Brooks*, 128 Ill. 222, 20 N. E. 685; *Juilliard v. May*, 130 Ill. 87, 22 N. E. 477; *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106. But if the assignment is against the public policy of the situs, even foreign creditors may attach. *Gardner v. Comm. Nat. Bank*, 95 Ill. 298; *Woodward v. Brooks*, 128 Ill. 222, 20 N. E. 685 (*semble*). — Ed.

² Statement of facts and arguments of counsel are omitted.— Ed.

appears from the motion, that the negotiation between the parties as to the mode of paying the defendant was commenced in Connecticut, continued in New York, and afterwards completed (that is, the negotiation), in the former State, which negotiation terminated in an agreement that the debtor should deliver to the creditor *at his residence in New York*, certain articles of property (which are the articles in dispute), in full payment and satisfaction of his debt of \$590. On that day the property was accordingly carried from Connecticut and delivered, and by the creditor received, *at his residence in New York*, and the note was cancelled. The defendant has not at any time since brought the property into this State, but has only made use of it *in New York*, as he would use his own property, claiming indeed that it was his own; and it is for this act of conversion that he is now sued in Connecticut, having come within our borders for a temporary purpose. If these are all the facts in the case, it is obvious, we think, that the defendant is not liable for the property. But are they indeed all? The plaintiff insists that they are not, for he says that on the 21st of October, Sands, being, and having been on the said 19th of October, in failing circumstances and insolvent, to the knowledge of the defendant, and intending soon to make an assignment of his property under and in conformity to the statute of the State for the benefit of insolvent debtors, assigned his property to the plaintiff, and that the defendant knew of this law and was willing and intended by the payment aforesaid to get his debt satisfied in full, while the other creditors might be able to get theirs paid only in part.

I do not understand that there is any claim of fraud or illegality in this transaction, beyond what is implied in the effort of the defendant (which was attended with success), to obtain the full payment of his debt in the manner stated. This then is the question: was his obtaining or receiving and applying the property of the debtor *in New York*, where by the law of New York the preference of payment was proper and legal, a valid transaction, or was it, under the circumstances, fraudulent and void?

We are satisfied that the transfer was a good one, and if good there it is good everywhere, as the law of the situs is the law which must govern the parties in this particular transaction. The agreement between them here and there, and the delivery and acceptance of the property in New York, may well enough be viewed in two aspects — one confined to what took place in New York as the chain of title, and the other taking into account what took place in both States. Either, in my judgment, will lead to a similar conclusion. As to the first, it was agreed that the debt should be paid at the residence of the creditor in New York. The property was there tendered, and there received and applied as agreed, which, in itself, is an unexceptionable transaction, perfectly harmonious with the law of the situs, and what is more, with the duty which the law recognizes in every case of a debt, of making full payment to the creditor.

In this view, I insist, transaction should be held to be a transfer by *delivery* in New York, a matter falling within the exclusive jurisdiction of the State where the parties were, and where the property was to be received by the creditor, who had a perfect right to come here and to demand the payment of his debt and to insist that it should be made to him at that place. The title was thus complete and perfect in New York by the accord and satisfaction and delivery. The preceding negotiation in Connecticut, even had it been confined to this State, which it was not, is not in my judgment a necessary part of the defendant's title. His title is good without it.

If then the title was acquired in New York, why is it not good everywhere else, according to the well settled doctrine of international law, especially as to a citizen of that State? Would not *her* courts insist upon as much as this? We are sure that they would, and if so, the defendant must be held free from accountability here for using or converting this property there, unless we mean to say that among these States the rule of property does not depend upon the law of the *rei situs*, but every sovereignty may act upon its own notions, irrespective of titles and rights required elsewhere. No such notion can be tolerated for a moment as a general rule of property, for it would introduce endless confusion and conflict into all our courts of justice, and make a man's rights of property depend upon the place he happened to be in at the time, and not upon the law of domicile or *rei situs*.

Quite too much stress, I must think, has been laid on a supposed violation of our statute law. In my view there is no such violation. The defendant is not chargeable with anything of the nature of an offence. Being a creditor of Sands in Connecticut, he came to him to get payment. His debtor agreed at once to pay him, and to carry the means of doing it to the creditor's house in New York. He did so, and thereby paid and cancelled his note as he well might do. Was this rendered fraudulent and utterly void, because the creditor understood that his debtor in Connecticut was in failing circumstances or was insolvent, and at an early day expected to make an assignment? We think not. Suppose the creditor had sent a letter to his debtor, instead of coming in person, and thereby induced his debtor to come to him in New York and pay him, would this have destroyed the payment? Or if the debtor, being transiently in New York, should pay his creditor in full, both parties knowing all the circumstances, would a future assignment in Connecticut destroy this payment and render the creditor liable to pay the money to the assignee? We think not. But it would be so, according to the doctrine claimed by the plaintiff's counsel. They insist that a foreign creditor cannot be put on a better ground than a domestic creditor, and surely, say they, such a payment or such an accord and satisfaction cannot be allowed to a domestic creditor. Certainly not. But our law does not reach a New York transaction,

nor does it control a citizen of New York taking property there in payment of his debt. Such a payment cannot be defeated unless our statute is to have an extraterritorial effect, for which no one will contend; so that the objection is not at all of the character assumed by those who urge its application to this case.

Once more, how is the assignment, made as it was two days after the delivery of the property in New York, to affect the title by delivery on the 19th, whether we regard the entire negotiation, or the understanding of the parties and corresponding delivery in New York, as conferring title? The sale was not fraudulent and void at the time, even if it was subject to be avoided by a future assignment, as would only be the case if it was altogether a Connecticut transaction. But it was not such; and since the title passed on the 19th, and was good on that and the next day, it cannot, after that time, be avoided in New York, unless our statute is to operate both retroactively and extraterritorially upon the transaction of the 19th, making void what was valid and legal before.

Let us look at the plaintiff's claim in another point of view. The defendant is said to have come into this State with full knowledge of all the circumstances, and induced the debtor to carry the property in controversy out of the State and pay his New York creditor in full, which, it is said, works a preference in favor of this particular creditor, which our statute does not allow; and it is said that the defendant cannot be allowed therefore to avail himself of it in any manner or to any extent whatever. But wherein is the wrong? Is it in the creditor's inducing his debtor to come into New York and pay him what he justly owed him there, or, in other words, in his inducing the defendant to keep his promise, which the law of the place pronounced to be just and obligatory? *Johnson v. Hunt*, 23 Wend. 87. What then is the crime of the defendant? What has he done that is wicked or wrongful? The thing done, I must think, is neither *malum in se* nor *malum prohibitum*, though within this State, in a certain contingent event, title may be taken away by an express provision of the statute in favor of a general assignee. If, before the assignment is made, the property has been sold and delivered out of the State, beyond the jurisdiction of our law, to a foreign creditor, it is not easy to see how it can be taken from the creditor, without giving to the law an extraterritorial effect which cannot be admitted, and which certainly will not be allowed in that foreign State.

Our view of the case is summarily expressed in the three following propositions: 1st. The title to the property in question passed to the defendant in New York on the 19th day of October, by its delivery and acceptance in payment of his debt; 2d. The insolvent law of Connecticut cannot subsequently divest the creditor of that property; and 3d. A title legally acquired under the law of the situs of the property, is, as a general rule of law, good elsewhere, and will be maintained. Following these principles, we find that the judge of the

superior court was in error in the view which he took of the law upon the facts found, and that the judgment below is erroneous.

In this opinion the other judges concurred, except BUTLER, J., who did not sit in the case.

*Judgment reversed.*¹

OSBORN v. ADAMS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1836.

[Reported 18 Pickering, 245.]

THE parties stated a case. The demandant claimed title to certain land in New Marlborough, in this county, by virtue of certain proceedings under a statute of Connecticut (St. 1828, c. 3, p. 182). Adonijah C. Powell, the original proprietor of the land, on July 16, 1833, at Canton, in Connecticut, under the provisions of that statute, for a nominal consideration, assigned all his property, including the demanded premises, to the demandant, in trust, for the benefit of all of his creditors, both parties to the deed being described as of Canton. On the same day and in connection with the assignment, Powell, by another deed also executed in Connecticut, conveyed to the demandant two parcels of land in New Marlborough, which embraced the demanded premises, the deed referring to the general assignment as to the purposes of the conveyance; and the last mentioned deed was, on the same day, duly recorded in the registry of deeds in this county.

It further appeared, that the demandant had not transferred or sold the land, or in any way distributed any avails of the same; and that he was not a creditor of Powell at the time of the assignment in trust.

The tenant claimed under a conveyance from Edward Stevens and other citizens of Massachusetts, who, as creditors of Powell, on July 20, 1833, attached the premises for debts long before contracted in Massachusetts. The action in which these attachments were made were entered, and judgments having been recovered therein, the executions were duly levied on the demanded premises. By the Connecticut St. 1828, c. 3, p. 182, it is provided that all assignments of real and personal estate by any person in failing circumstances, with a view to his insolvency, to any person or persons, in trust for his creditors, shall, as against the creditors of such assignor, be deemed void, unless made for the benefit of all of such creditors, *pro rata*, and lodged for record in the court of probate; that such trustees shall give bond to

¹ *Acc. Cragin v. Lamkin*, 7 All. 395. Subsequent removal of the property by the assignee to the assignor's or another State will not divest the title of the former. The *Watchman*, 1 Ware, 232; *Forbes v. Scannell*, 13 Cal. 242; *McKibbin v. Ellingson*, 58 Minn. 205, 59 N. W. 1008; *Johnson v. Hunt*, 23 Wend. 87; *Moore v. Willett*, 35 Barb. 663. *Contra*, *Gardner v. Lewis*, 7 Gill, 377. — Ed.

the court of probate for the faithful performance of their duties; and that on the complaint of any person interested in the trust, such court may remove any trustee of the property so assigned on sufficient cause being shown for such removal.

The only question raised between the parties was as to the legal effect of the proceedings which took place on July 16, 1833.

If upon these facts the court should be of opinion that the legal title to the premises was in the demandant, the tenant was to be defaulted; but if they should be of opinion that the tenant had the better title, the demandant was to become nonsuit.¹

WILDE, J. As to the assignment under the statute of Connecticut, it is very clear that Powell's title to real estate within this Commonwealth could not pass thereby. The title and disposition of real estate is exclusively subject to the laws of the country where it is situated, which alone can prescribe a mode by which a title to it can pass. *M'Cormick v. Sullivant*, 10 Wheat. 202. This statutory assignment therefore, in regard to real estate situated in this Commonwealth, is merely void. It can neither pass a title, nor aid one otherwise defective.

The demandant then must rely solely on his conveyance from Powell, and this, no doubt, would be a valid title against a stranger, or any one not claiming under him. But the tenant claims under the creditors of Powell, who attached the demanded premises in a few days after the conveyance to the demandant; and these attachments have been perfected by entry of the actions, and judgments duly rendered thereon, and levy of executions in due form of law. Such being the title of the tenant, it appears to us very clear that the demandant's title cannot prevail against it. The deed to the demandant was a mere voluntary conveyance. No consideration was paid; and although the conveyance to the demandant was in trust for Powell's creditors, yet they were not parties to it, and have not discharged their debts. It is admitted, that no sale or transfer of the demanded premises has been made by the demandant, nor has he in any way distributed any avails of the same. He was not a creditor, but a trustee only; and the trust was created by the proceedings under the statute of the State of Connecticut, of which we can take no notice. The conveyance was ancillary to those proceedings, and those being void as against Powell's creditors, it follows conclusively that there was no consideration on which the conveyance can be maintained against the title derived from those creditors. We can no more take notice of a trust created under a foreign government than we can of a will not proved nor recorded in this Commonwealth. And, independent of the proceedings under the statute of Connecticut, the conveyance to the demandant was merely voluntary. According to the agreement of the parties, therefore, he must become nonsuit.²

¹ Arguments of counsel are omitted. — Ed.

² *Acc. Moore v. Church*, 70 Ia. 203, 30 N. W. 855; *Thompkins v. Adams*, 41 Kan. 38, 20 Pac. 530; *Bentley v. Whittemore*, 18 N. J. Eq. 366; *Nat. Exchange Bank v.*

IN RE ARTOLA HERMANOS. ·

COURT OF APPEAL. 1890.

[Reported 24 Queen's Bench Division, 640.]

FRY, L. J.¹ The short facts of this case, as they appear to me to result from the statement of the learned counsel and the evidence before us, especially the statement of affairs which has been put in evidence, are these. There were five brothers, Spaniards by birth, therefore presumably of Spanish domicile of origin. Two of those brothers are residing in Paris, one of them in Spain, and two in England, the five brothers carrying on an extensive business as merchants and bankers in Spain, France, and in England, and they have in Spain large immovable assets. The conclusion from these facts would naturally be that all the five brothers have a Spanish domicile. Nothing has appeared to the contrary of that conclusion, and as the Lord Chief Justice has already observed, Mr. Finlay, who appeared for the applicant, did not desire time to produce evidence to countervail that conclusion.

The application made by the French syndic is of a double character. In the first place, he applies for the rescission of a receiving order. In the next place he asks for a stay of all further proceedings, and that the assets in the English bankruptcy may be handed over to the French syndic. Now, with regard to the receiving order, it appears to me plain that this court had jurisdiction, because the 6th section of the Bankruptcy Act, 1883, refers to the domicile of the debtor or his ordinary residence or permanent place of business for a year before the date of the presentation of the petition. It is not denied that the circumstance of residence in England is present in the case of two of the brothers. Is there then any ground on which it would be improper to exercise the jurisdiction of the court in pronouncing a receiving order? I will not say that a receiving order would be *ex debito justitiæ*; but I think a receiving order ought to be pronounced where the conditions of the Act have been satisfied, unless there be some valid reason to the contrary.

Stelling, 31 S. C. 360, 9 S. E. 1028. Conversely, if the assignment was invalid where made, but was good by the law of the situs, the assignee may hold the land against attaching creditors. First Nat. Bank v. Hughes, 10 Mo. App. 7; and see Chipman v. Peabody, 159 Mass. 420, 34 N. E. 563. *A fortiori*, if the assignment is valid where made and by the law of the situs, the assignee may hold the land. King v. Glass, 73 Ia. 205, 34 N. W. 820; Palmer v. Mason, 42 Mich. 146, 3 N. W. 945; Sortwell v. Jewett, 9 Oh. 180.

An insolvent assignment by act of court will of course not pass foreign real estate. Watson v. Holden, 58 Kan. 666; Rogers v. Allen, 3 Oh. 488. And it has been held that a deed of the foreign land, in the form required by the law of the situs, given under order of the Court of Insolvency, in order to obtain a discharge, will not pass the title. Hutcheson v. Peshine, 16 N. J. Eq. 167; Macdonald v. Lumber Co., 2 Can. 364; *contra*, Lamb v. Fries, 2 Barr, 83. Such a deed will pass the title against the assignor and his heirs. Harvey v. Edens, 69 Tex. 420, 6 S. W. 306. — ED.

¹ The concurring opinion of Lord COLERIDGE, C. J., is omitted. — ED.

Now in the present case no such reason has been made out. On the contrary, the presence of assets of the firm to a large extent in this country seems to me, as it seemed to Baggallay, L. J., in *Ex parte Robinson*, 22 Ch. D. 816, to be a strong circumstance in favor of the making of a receiving order. I think, therefore, that, on the merits, the receiving order ought not to be rescinded; but I further express at least my doubt whether the French syndic has any *locus standi* whatever, either to oppose the pronouncing of a receiving order in this country, or to apply for its rescission after it has been pronounced.

Turning to the second portion of the application, namely, that all proceedings in the English bankruptcy may be stayed, I will confess the difficulty which this class of case appears to me to create. Lord Eldon, I think, on more than one occasion described these cases as being very distressing cases, and something of the distress which he felt has, I think, remained to successive judges who have had to deal with these concurrent bankruptcies.

Three views with regard to what was the proper procedure of the court seem to me to have come out during the course of the discussion of the cases. One of those views is this, that where there are concurrent bankruptcies each forum is to administer the assets locally situated within its jurisdiction, each forum of course allowing all the creditors, wherever resident, to prove, but applying the doctrine of hotchpot so as to produce, so far as may be, equality between the proofs of the various creditors. Now no doubt in that mode of procedure there are several inconveniences, especially the possibility of double or triple proofs, but it may be that those inconveniences are less than the inconveniences of any other course. It certainly seems to me that the decision of the House of Lords in the case of *Ewing v. Orr-Ewing*, 9 App. Cas. 34, tends to establish a similar principle with regard to the assets to be administered in administration actions, because in that case they asserted, if I understand the decision rightly, the jurisdiction of the forum in which the assets might be locally situate to administer those assets, although it may be that the law of the domicile may govern the mode of distribution. Now if that rule be applied, it is obvious the application to stay the proceeding must fail.

Another rule which has been suggested is this, that every other forum shall yield to the forum of the domicile, that the forum of every foreign country, every country not of the domicile, shall act only as accessory and in aid of the forum of the domicile. That, it is said, is the *forum concursus*, to which all persons who are interested in the administration of the estate are bound to have recourse. No doubt there is a great deal in point of law and principle to be said in favor of that view, and there are certainly some conveniences in it. If that view were to prevail then this present application fails.¹

¹ The personal estate of a bankrupt, wherever situated, passes to his assignee appointed by the court of his domicile. *Sill v. Worswick*, 1 H. Bl. 665; *Re Howse*, 3 Jut. 14; *Perrin v. Turton*, 1 Transv. Prov. 25. — Ed.

Then there is a third view, which is the only one in which the application could be successful, and it is this, that the forum of the country in which the debtor has assets and which first adjudicates him bankrupt, although it be not the forum of the domicil, is entitled to claim the assets from the tribunals of other countries in which he has assets. That doctrine appears to me to be an entirely unreasonable one. There is this broad difference between yielding to the forum of the domicil and yielding to the forum of the first country which happens to pronounce a man bankrupt:—personal property is said to follow the person, and from that it follows that the forum of domicil has, by what has been sometimes called a fiction of law, a right by judgment against a bankrupt to divest him of all personal property and vest it in his assignees, and by the fiction to which I have referred that judgment, pronounced by the forum of the domicil, is said to have universal validity, and to be capable of transferring personal property locally situate beyond the jurisdiction of that forum. The forum, not of the domicil but of the country in which the debtor may have assets, has no such right to claim universal obedience to its judgment; it has no right to pronounce a judgment which will extend beyond the personal assets locally situate within its jurisdiction.

It seems to me, therefore, that the contention which, as I have already said, is the only one on which the application can succeed—that every other forum must yield to the forum of a country, in which there are assets, which first pronounces the bankruptcy—is one inconsistent with well-known principles of law. But then it is said that Stein's Case, 1 Rose, 462, proceeds on that principle, and it was elaborately and ably urged upon us that that was the true view of that case. I do not conceal from myself that there are difficulties in that case. It is not easy to see what were the facts on which the court arrived at the conclusion with regard to the domicil at which they did arrive. Further, it would appear that the Scotch court considered, and for aught I know considered rightly according to Scotch law, that a firm of merchants has a domicil as a firm, and they seem further to have considered that a firm is capable of having two domicils, and they chose between the two domicils only by priority of adjudication. But nevertheless the case proceeds upon this main principle, that the court of the domicil has the right to pronounce a universally valid judgment with regard to the personal property of the bankrupt. That proposition underlies the decision, and whatever difficulties there may be in the application of it do not detract from it. That general principle is fatal to the present application.

Therefore I entirely agree with the Lord Chief Justice in the judgment which he has given, and I think this application must fail.

Appeal dismissed.

IN THE MATTER OF THE ACCOUNTING OF WAITE.

COURT OF APPEALS, NEW YORK. 1885.

[*Reported 99 New York, 433.*]

EARL, J. On the 15th day of October, 1881, Haynes & Sanger, a firm doing business in the city of New York, having become insolvent, made a general assignment, for the benefit of their creditors, to Charles Waite, who was a member of the firm of Pendle & Waite, and in their assignment preferred that firm as creditors for a large amount. Pendle & Waite did business in New York and London, Waite being a citizen of this country residing in the city of New York and having charge of the business of his firm there, and Pendle being a citizen of England and having charge of the firm business there. That firm became insolvent and suspended business in England in February, 1882, and Waite then went to England, and there he and Pendle filed a petition in the London Court of Bankruptcy, in which they recited their inability to pay their debts in full, and that they were "desirous of instituting proceedings for the liquidation of their affairs by arrangement or composition with their creditors, and hereby submit to the jurisdiction of this court in the matter of such proceeding." Waite signed the petition in person, and through his counsel at once secured the appointment of Schofield as receiver, in bankruptcy, of the firm property.

Liquidation by arrangement or composition is a proceeding under the English bankruptcy act which provides that the filing of such a petition is an act of bankruptcy; that a compromise proposition may be made by a debtor, and that if such proposition shall be accepted by the creditors at a general meeting, and then confirmed at a second general meeting, and registered by the court, it becomes binding and may be carried out under the supervision of the court; that if it appears to the court on satisfactory evidence that a composition cannot in consequence of legal difficulties, or for any other sufficient cause, proceed without injustice or undue delay to the creditors, or the debtor, the court may adjudge the debtor a bankrupt and proceedings may be had accordingly, and that the title of the trustee in bankruptcy, when appointed, relates back to the time of the commission of the act of bankruptcy.

For reasons which it is unnecessary now to consider or relate, the composition failed, and then upon the application of creditors, which was opposed by Waite, Pendle & Waite were adjudged bankrupts, and Schofield was appointed trustee of the firm property. By the English law, the due appointment of a trustee in bankruptcy, under the English bankruptcy act, transfers to the trustee all the personal property of the bankrupt wherever situated, whether in Great Britain or elsewhere.

Notwithstanding his bankruptcy, Waite continued to act as assignee

of Haynes & Sanger and converted the assets of that firm into money, and under the preference given to his firm paid himself for the firm of Pendle & Waite the sum of \$14,333.70. He paid no portion of that sum to Pendle or to the creditors of his firm, the American creditors of such firm having been fully paid from other assets of the firm.

After all this, Waite filed his petition in the Court of Common Pleas of the city of New York for a settlement of his accounts as assignee, and citations were issued, served, and published for that purpose, and a referee was appointed to take and state his accounts. In his accounts he entered and claimed a credit for the sum paid to himself as above stated. Schofield, through his attorney, appeared upon the accounting and as trustee objected to the credit and claimed that sum should be paid to him. The referee ruled that the law of this State does not recognize the validity of foreign bankruptcy proceedings to transfer title to property of the bankrupt situated here, and for that reason held that the payment by Waite, as assignee, to himself as a member of the firm of Pendle & Waite, was valid, and that he was entitled to the credit claimed. The same view of the law was taken at the special and general terms of the common pleas, and then Schofield appealed to this court.

We have stated the facts as found by the referee, and as the respondent did not and could not except to the findings, and is therefore in no condition to complain of them, we must assume that they were based upon sufficient evidence.

The transfer of the property of Pendle & Waite to Schofield as trustee was *in invitum*, solely by operation of the English bankrupt law. While the proceeding first instituted by the bankrupts to arrange a composition with their creditors was voluntary, the final proceeding through which the adjudication in bankruptcy was had, and the trustee appointed was adversary and against their will, having no basis of voluntary consent to rest on. *Willitts v. Waite*, 25 N. Y. 577.

If the transfer effected by the bankruptcy proceedings is to have the same effect here as in England, then the title to the money due to the bankrupts from Haynes & Sanger was vested in the trustee. Schofield was appointed receiver of the property of the bankrupts in March, 1882, and then the title passed out of them. That title continued in him as receiver until he was appointed trustee. After he was appointed receiver and before or after he was appointed trustee (which does not appear), Waite as assignee paid himself as a member of the firm of Pendle & Waite the sum of money in controversy. He had notice of the bankruptcy proceedings and knew that the title to the money due from Haynes & Sanger and from himself as their assignee had passed out of the bankrupts to Schofield, and hence he had no right to make payment to them. Schofield became substituted in their place, and Waite was bound to make payment to him, and cannot, therefore, have credit for a payment wrongfully made. And Schofield, standing in

the place of the original creditors of Haynes & Sanger, had the right to appear upon the accounting and object to the erroneous payment made in disregard of his rights. But the alleged payment was merely formal, not real. Waite, the assignee, still has the money and is accountable for it to the proper party. It is not perceived how it can be claimed that Schofield was bound at any time before the accounting to make any demand upon the assignee. He was a creditor holding the claim originally due to Pendle & Waite, and as such he could appear upon the accounting, with all the rights of any other creditor, to protect his interests, and he could not be prejudiced by a payment alleged to have been made by the assignee to himself. All this is upon the assumption that the transfer to Schofield as trustee is to have the same force and effect here as against the bankrupts as in England; and whether it must have, is the important and interesting question to be determined upon this appeal.

It matters not that Waite was a citizen of this country, domiciled here. He went to England and invoked and submitted to the jurisdiction of the bankruptcy court there and is bound by its adjudication to the same extent as if he had been domiciled there. The adjudication estopped him just as every party is estopped by the adjudication of a court which has jurisdiction of his person and of the subject-matter.

We have not a case here where there is a conflict between the foreign trustee and domestic creditors. So far as appears no injustice whatever will be done to any of our own citizens, or to any one else, by allowing the transfer to have full effect here. Indeed justice seems to require that this money should be paid to the foreign trustee for distribution among the foreign creditors of the bankrupts.

The effect to be given in any country to statutory *in invitum* transfers of property through bankruptcy proceedings in a foreign country has been a subject of much discussion among publicists and judges, and unanimity of opinion has not and probably never will be reached. We shall not enter much into the discussion of the subject and thus travel over ground so much marked by the footsteps of learned jurists. Our main endeavor will be to ascertain what, by the decisions of the courts of this State, has become the law here.¹

In *Willitts v. Waite* (25 N. Y. 577), it was held that statutory receivers appointed in Ohio could not enforce their title to the property of the insolvent in this State against creditors subsequently attaching it here, under our laws. In that case, while Sutherland, J., was of opinion that from comity the courts of this State should recognize and allow some effect to a foreign involuntary bankrupt proceeding, yet he erroneously said that he understood that a title under such proceedings

¹ The learned judge here examined the following cases: *Bird v. Caritat*, 2 Johns. 342; *Raymond v. Johnson*, 11 Johns. 488; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Holmes v. Remsen*, 20 Johns. 229; *Plestoro v. Abraham*, 1 Paige, 286, 3 Wend. 538; *Johnson v. Hunt*, 23 Wend. 87; *Hoyt v. Thompson*, 5 N. Y. 320, 19 N. Y. 207. — Ed.

"would not be recognized by the courts of this State, even when the question arises entirely between the bankrupt and his assignees and creditors all residing in the country under whose laws the assignment was made." Allen, J., writing in the same case, said: "A *quasi* effect may be given to the law (of a foreign State) as a matter of comity and interstate or international courtesy, when the rights of creditors or *bona fide* purchasers, or the interests of the State do not interfere, by allowing the foreign statutory or legal transferee to sue for it in the courts of the State in which the property is;" and that "the State will do justice to its own citizens so far as it can be done by administering upon property within its jurisdiction, and will yield to comity in giving effect to foreign statutory assignments only so far as may be done without impairing the remedies or lessening the securities which our laws have provided for our own citizens." The rule, as stated by Judges Platt, Ruggles, Allen, and other eminent jurists, whose opinions we have quoted, were also fully recognized in the following cases: *Peterson v. Chemical Bk.*, 32 N. Y. 21; *Kelly v. Crapo*, 45 N. Y. 86; *Osgood v. Maguire*, 61 N. Y. 524; *Hibernia Bk. v. La-combe*, 84 N. Y. 367; *Matter of Bristol*, 16 Abb. Pr. 184; *Runk v. St. John*, 29 Barb. 585; *Barclay v. Quicksilver Mining Co.*, 6 Lans. 25; *Hooper v. Tuckerman*, 3 Sandf. 311; *Olyphant v. Atwood*, 4 Bosw. 459; *Hunt v. Jackson*, 5 Blatchf. 349.

From all these cases the following rules are to be deemed thoroughly recognized and established in this State: (1) The statutes of foreign States can in no case have any force or effect in this State *ex proprio vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. (2) But the comity of nations which Judge Denio in *Peterson v. Chemical Bank* (*supra*) said is a part of the common law, allows a certain effect here to titles derived under, and powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here, when they can be, without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided also that such titles are not in conflict with the laws or the public policy of our State. (3) Such foreign assignees can appear and, subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with, or withhold the property of the bankrupt.

If it be admitted, as it must be under the authorities cited, that Schofield can, as assignee of Pendle & Waite, have a standing in our courts, and that his title will be so far recognized here that he can sue the debtors of that firm to recover the amount owing to the firm, why may he not sue the bankrupts? If the assignee could sue Haynes & Sanger to recover what they owed the bankrupts, why can he not be permitted to sue the bankrupts for money or property placed in their hands to pay the debt? If he could sue Haynes & Sanger, why could

not he sue their assignee, although a member of the bankrupt firm, to recover the money placed in his hands to pay their debt? No principle of justice, no public policy requires the courts of this State to ignore the title of this assignee at the instance of one of the bankrupts. No injustice will be done to Waite if this money be taken to pay his creditors, and public policy does not require that the courts of this State should protect him in his efforts either to cheat his creditors or his partner. If it be conceded, as it must be, that the title of a foreign statutory assignee is good in this State for any purpose against anybody, it seems to us that it ought to be held good against the bankrupt against whom an adjudication in bankruptcy has been pronounced which is binding upon him.

Before such an adjudication can be held to be efficacious in a foreign country to transfer title to property, the bankrupt court must have had jurisdiction of the bankrupt either because made in the country of his domicile or because he, although domiciled elsewhere, submitted to the jurisdiction or in some other way came under the jurisdiction of the bankrupt court. Here Pendle & Waite did most of their business in England. Most of their assets and of their creditors were there, and while Pendle alone was domiciled there, Waite went there and submitted to the jurisdiction of the bankrupt court and exposed himself to the operation of English law. He is therefore bound by the adjudication of the court as he would have been if domiciled there, and the judgment had been in a common law court upon any personal cause of action.

The decisions in the federal courts, and in most of the other States, are in harmony with the views we have expressed; and so are the doctrines of all the great jurists who have written upon the subject of private international law. 2 Bell's Comm. 681, 687; Wheaton's Int. L. [8th ed., by Dana], §§ 89, 90, 91, 144 and note; 2 Kent's Comm. 405; Wharton's Conf. of Laws, §§ 353, 368, 391, 735, 736; Story's Conf. of Laws, §§ 403, 410, 412, 414, 420, 421.

There are but two cases in this State which really hold anything in conflict with these views, and they are *Mosselman v. Caen* (34 Barb. 66; N. Y. Sup. Ct. [4 T. & C.] 171). In the first case the action was by foreign trustees, appointed in bankruptcy proceedings, to recover goods in the possession of the defendant in this country, and the plaintiffs recovered. The defendant appealed, and sought to reverse the judgment upon the ground that the plaintiffs did not, as trustees, have any title to the property. The judgment was affirmed, on the ground that the defendant did not raise the question of title at the trial. But the judges writing were of opinion that the plaintiffs did not have any title to the bankrupt's property located here, and one of them (Sutherland, J.) stated that the case of *Abraham v. Plestoro* (3 Wend. 538), confirmed by *Johnson v. Hunt*, "would seem to be conclusive upon the question, whether our courts will recognize or enforce a right or title acquired under a foreign bankrupt law or foreign bank-

ruptcy judicial proceedings. The case of *Abraham v. Plestoro* was certainly very broad in its repudiation of foreign bankruptcy proceedings, and went much further than the case of *Holmes v. Remsen* (20 Johns. 229) ; but I think it must be deemed conclusive authority for saying, that had the defendant raised the question by demurrer, or on the trial, it must have been held that the plaintiffs could not maintain this action." In the second case *Davis, P. J.*, writing the opinion of the court, said: "It seems to be the settled law of this State that our courts will not recognize or enforce a right or title acquired under a foreign bankrupt law, or foreign bankrupt proceedings, so far as affects property within their jurisdiction, or demands against residents of the State." These two cases are unsupported by authority, and are, we think, opposed to sound principles, and are in conflict with the current of authority in this State.

We are, therefore, of opinion that Schofield was competent to appear upon the accounting to protect the interests of the bankrupt estate which he represented, and that, upon the facts as they appear in this record, his objection to the allowance of the payment made by the assignee to himself ought to have prevailed, and that he should be recognized as a creditor for the amount of such payment.

It follows that the orders of the General and Special Terms should be reversed, and, as the facts may be varied or more fully presented upon a new hearing, the matter should be remitted to the Special Term for further proceedings upon the same or new evidence, in accordance with the rules of law herein laid down, and that the appellant should recover from the respondent costs of the appeals to the General Term and to this court.

All concur.

Ordered accordingly.

SECURITY TRUST COMPANY v. DODD, MEAD & CO.

SUPREME COURT OF THE UNITED STATES. 1899.

[*Reported 173 United States, 624.*]

THIS was an action originally instituted in the District Court for the Second Judicial District of Minnesota, by the Security Trust Company, as assignee of the D. D. Merrill Company, a corporation organized under the laws of Minnesota, against the firm of Dodd, Mead & Company, a partnership resident in New York, to recover the value of certain stereotyped and electrotyped plates for printing books, upon the ground that the defendants had unlawfully converted the same to their own use. The suit was duly removed from the State court to the Circuit Court of the United States for the District of Minnesota, and was there tried. Upon such trial the following facts appeared:—

The D. D. Merrill Company having become insolvent and unable to pay its debts in the usual course of business, on September 23, 1893, executed to the Security Trust Company, the plaintiff in error, an assignment under and pursuant to the provisions of chapter 148 of the laws of 1881 of the State of Minnesota, which assignment was properly filed in the office of the clerk of the District Court. The Trust Company accepted the same, qualified as assignee, took possession of such of the property as was found in Minnesota, and disposed of the same for the benefit of creditors, the firm of Dodd, Mead & Company having full knowledge of the execution and filing of such assignment.

At the date of this assignment, the D. D. Merrill Company was indebted to Dodd, Mead & Company of New York in the sum of \$1,249.98, and also to Alfred Mudge & Sons, a Boston co-partnership in the sum of \$126.80, which they duly assigned and transferred to Dodd, Mead & Company, making the total indebtedness to them \$1,376.78.

Prior to the assignment, the D. D. Merrill Company was the owner of the personal property for the value of which this suit was brought. This property was in the custody and possession of Alfred Mudge & Sons at Boston, Massachusetts, until the same was attached by the sheriff of Suffolk County, as hereinafter stated.

The firm of Alfred Mudge and Sons was, prior to March 8, 1894, informed of the assignment by the Merrill Company, and at about the date of such assignment a notice was served upon them by George E. Merrill to the effect that he Merrill, took possession of the property in their custody for and in behalf of the Security Trust Company, assignee aforesaid.

On March 8, 1894, Dodd, Mead & Company commenced an action against the D. D. Merrill Company in the superior court of the county of Suffolk, upon their indebtedness, caused a writ of attachment to be issued, and the property in possession of Mudge & Sons seized upon such writ. A summons was served by publication in the manner prescribed by the Massachusetts statutes, although there was no personal service upon the Merrill Company. The Security Trust Company, its assignee, was informed of the bringing and pendency of this suit and the seizure of the property, prior to the entering of a judgment in said action, which judgment was duly rendered August 6, 1894, execution issued, and on September 27, 1894, the attached property was sold at public auction to Dodd, Mead & Company, the execution creditors, for the sum of \$1,000.

Upon this state of facts, the Circuit Court of Appeals certified to this court the following questions: —

“First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualification as assignee thereunder, vest said assignee with the title to the personal property aforesaid, then located in the State of Massa-

chusetts, and in the custody and possession of said Alfred Mudge & Sons?

“Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk County, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim?”

BROWN, J. This case raises the question whether an assignee of an insolvent Minnesota corporation can maintain an action in the courts of Minnesota for the conversion of property formerly belonging to the insolvent corporation, which certain New York creditors had attached in Massachusetts, and sold upon execution against such corporation. The question was also raised upon the argument how far an assignment, executed in Minnesota, pursuant to the general assignment law of that State, by a corporation there resident, is available to pass personal property situated in Massachusetts as against parties resident in New York, who, subsequent to the assignment, had seized such property upon an attachment against the insolvent corporation.

The assignment was executed under a statute of Minnesota, the material provisions of which are hereinafter set forth. The instrument makes it the duty of the assignee “to pay and discharge, in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of the first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter 148 of the General Laws of the State of Minnesota for the year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such case made and provided; and if, after the payment of all the costs, charges, and expenses attending the execution of said trust, and the payment and discharge in full of all the said debts of the party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then, Third, repay such surplus to the party of the first part, its successors and assigns.”

The operation of voluntary or common law assignments upon property situated in other States has been the subject of frequent discus-

sion in the courts, and there is a general consensus of opinion to the effect that such assignments will be respected, except so far as they come in conflict with the rights of local creditors, or with the laws or public policy of the State in which the assignment is sought to be enforced. The cases in this court are not numerous, but they are all consonant with the above general principle. *Black v. Zacharie*, 3 How. 483; *Livermore v. Jenckes*, 21 How. 126; *Green v. Van Buskirk*, 5 Wall. 307; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664; *Cole v. Cunningham*, 133 U. S. 107; *Barnett v. Kinney*, 147 U. S. 476.

But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a State insolvent law operates only upon property within the territory of that State, and that with respect to property in other States it is given only such effect as the laws of such State permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another State. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the State where the property is actually situated. *Harrison v. Sterry*, 5 Cranch, 289, 302; *Ogden v. Saunders*, 12 Wheat. 213; *Booth v. Clark*, 17 How. 322; *Blake v. Williams*, 6 Pick. 286; *Osborn v. Adams*, 18 Pick. 245; *Zipcey v. Thompson*, 1 Gray, 243; *Abraham v. Plestoro*, 3 Wend. 538, overruling *Holmes v. Remsen*, 4 Johns. Ch. 460; *Johnson v. Hunt*, 23 Wend. 87; *Hoyt v. Thompson*, 5 N. Y. 320; *Willits v. Waite*, 25 N. Y. 577; *Kelly v. Crapo*, 45 N. Y. 86; *Barth v. Backus*, 140 N. Y. 230; *Weider v. Maddox*, 66 Tex. 372; *Rhawn v. Pearce*, 110 Ill. 350; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477. As was said by Mr. Justice McLean in *Oakey v. Bennett*, 11 How. 33, 44, "A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment." Similar language is used by Mr. Justice Story in his *Conflict of Laws*, § 414.¹

The statute of Minnesota, under which this assignment was made, provides in its first section that any insolvent debtor "may make an

¹ *Acc. Le Chevalier v. Lynch*, 1 Doug. 170; *Reynolds v. Adden*, 136 U. S. 348; *Betton v. Valentine*, 1 Curt. 168; *Paine v. Lester*, 44 Conn. 196; *Rhawn v. Pearce*, 110 Ill. 350; *Johnson v. Parker*, 4 Bush. 149 (*semble*); *Metcalf v. Yeaton*, 51 Me. 198; *Wood v. Parsons*, 27 Mich. 159; *Beer v. Hooper*, 32 Miss. 246; *Hoyt v. Thompson*, 19 N. Y. 207; *Bizzell v. Bedient*, 2 Car. L. Rep. 254; *Milne v. Moreton*, 6 Binn. 353; *Goodsell v. Benson*, 13 R. I. 225 (*semble*); *McClure v. Campbell*, 71 Wis. 350, 37 N. W. 343. *Contra*, *Long v. Girdwood*, 150 Pa. 413, 24 Atl. 711. — Ed.

assignment of all his unexempt property for the equal benefit of all his *bona fide* creditors, who shall file releases of their demands against such debtor, as herein provided." That such assignments shall be acknowledged and filed, and if made within ten days after the assignor's property has been garnished or levied upon, shall operate to vacate such garnishment or levy at the option of the assignee, with certain exceptions. The second section provides for putting an insolvent debtor into involuntary bankruptcy on petition of his creditors, upon his committing certain acts of insolvency, and for the appointment by the court of a receiver with power to take possession of all his property, not exempt, and distribute it among his creditors. Under either section only those creditors receive a benefit from the act who file releases to the debtor of all their demands against him. This statute was held not to conflict with the Federal Constitution in *Denny v. Bennett*, 128 U. S. 489.

The construction given to this act by the Supreme Court of Minnesota has not been altogether uniform. In *Wendell v. Lebon*, 30 Minn. 234, the act was held to be constitutional. It was said that "the act in its essential features is a bankrupt law;" but it was intimated that it included all the debtor's property wherever situated; "and while other jurisdictions might, on grounds of policy, give preference to domestic attaching creditors over foreign assignees or receivers in bankruptcy, yet, subject to this exception, they would, on principles of comity, recognize the rights of such assignees or receivers to the possession of the property of the insolvent debtor."

In *In re Mann*, 32 Minn. 60, the act was, in effect, again pronounced "a bankrupt law, providing for voluntary bankruptcy by the debtor's assignment;" and in this respect differing from a previous assignment law. See also *Simon v. Mann*, 33 Minn. 412, 414.

In *Jenks v. Ludden*, 34 Minn. 482, it was held that the courts of that State had no right to enjoin the defendant, who was a citizen of Minnesota, from enforcing an attachment lien on certain real property in Wisconsin owned by the insolvent debtors, although the execution of the assignment might, under the Minnesota statute, have dissolved such an attachment in that State; and that, even if they had the power to do so, they ought not to exercise their discretion in that case, where the only effect might be to enable non-resident creditors to step in and appropriate the attached property. The court repeated the doctrine of the former case, that the act was a bankrupt act; the assignee being in effect an officer of the court, and the assigned property being in *custodia legis*, and administered by the court or under its direction. The court added: "We may also take it as settled that the question whether property situated in Wisconsin is subject to attachment or levy by creditors, notwithstanding any assignment made in another State, is to be determined exclusively by the laws of Wisconsin." To the same effect see *Daniels v. Palmer*, 35 Minn. 347; *Warner v. Jaffray*, 96 N. Y. 248.

Upon the other hand, in *Covey v. Cutler*, 55 Minn. 18, an insolvent debtor who had made an assignment under this statute, had a certain amount of salt in Wisconsin, which the defendants had attached in a Wisconsin court. The salt was sold upon the judgment, bid in by them, and the assignee in Minnesota brought an action to recover the value of the salt. Defendants answered, claiming that the assignee never took possession of the salt, and that the Minnesota assignment was ineffectual to transfer the title to property in Wisconsin as against attaching creditors there. Plaintiff was held entitled to judgment upon the ground that a voluntary conveyance of personal property, valid by the law of the place, passed title wherever the property may be situated and that such transfers, upon principles of comity, would be recognized as effectual in other States when not opposed to public policy or repugnant to their laws. It is difficult to reconcile this with the previous cases, or with that of *Green v. Van Buskirk*, 7 Wall. 139. The assignment was apparently treated as a voluntary or common law assignment. This ruling was repeated in *Hawkins v. Ireland*, 64 Minn. 339, in which an assignment under this statute was said not to be involuntary but voluntary, and that a court of equity had the power to, and would, restrain one of its own citizens, of whom it had jurisdiction, from prosecuting an action in a foreign State or jurisdiction, whenever the facts of the case made it necessary to do so, to enable the court to do justice and prevent one of its citizens from taking an inequitable advantage of another. This accords with *Dehon v. Foster*, 4 Allen, 545, and *Cunningham v. Butler*, 142 Mass. 47; s. c., *sub nom.* *Cole v. Cunningham*, 133 U. S. 107.

The earlier opinions of the Supreme Court of Minnesota to the effect that the statute in question was a bankrupt act, were followed by the Supreme Court of Wisconsin in *McClure v. Campbell*, 71 Wis. 350, in which it was held that the assignment could have no legal operation out of the State in which the proceedings were had, and that the decision of the Supreme Court of Minnesota that the act of 1881 was a bankrupt act was binding. The contest was between the assignee of the insolvent debtor and a creditor who had attached the property of the insolvent in Wisconsin. The court held that the plaintiff, the assignee, took no title to such property, and was not entitled to its proceeds. In delivering the opinion the court said: "We think the question is not affected by the fact that the property, when seized, was in the possession of the assignee, or that the attaching creditor is a resident of the State in which the insolvency or bankruptcy proceedings were had. . . . While some of them" (the cases) "may, under especial circumstances, extend the rule of comity to such a case, and thus give an extraterritorial effect to somewhat similar assignments, we are satisfied that the great weight of authority is the other way. The rule in this country is, we think, that assignments by operation of law in bankruptcy or insolvency proceedings, under which debts may be compulsorily discharged without full payment thereof, can

have no legal operation out of the State in which such proceedings were had."

In *Franzen v. Hutchinson*, 94 Iowa, 95, 62 N. W. Rep. 698, the Supreme Court of Iowa had this statute of Minnesota under consideration, and held that as the creditors received no benefit under the assignment, unless they first filed a release of all claims other than such as might be paid under the assignment, it would not be enforced in Iowa. It was said that the assignment, which was that of an insurance company, was invalid, and that in an action by the assignee for premiums collected by the defendants, who were agents of the company, the latter could offset claims for unearned premiums held by policy holders at the time of the assignment and by them assigned to defendants after the assignment to plaintiffs.

Notwithstanding the two later cases in Minnesota above cited, we are satisfied that the Supreme Court of that State did not intend to overrule the prior decisions to the effect that the act was substantially a bankrupt or insolvent law. It is true that in these cases a broader effect was given to this act with respect to property in other States than is ordinarily given to statutory assignments, though voluntary in form. But the court was speaking of its power over its own citizens, who had sought to obtain an advantage over the general creditors of the insolvent by seizing his property in another State. There was no intimation that the prior cases were intended to be overruled, nor did the decisions of the later cases require that they should be.

So far as the courts of other States have passed upon the question, they have generally held that any State law upon the subject of assignments, which limits the distribution of the debtor's property to such of his creditors as shall file releases of their demands, is to all intents and purposes an insolvent law; that a title to personal property acquired under such laws will not be recognized in another State, when it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, though the proceedings were instituted subsequent to and with notice of the assignment in insolvency. The provision of the statute in question requiring a release from the creditors in order to participate in the distribution of the estate, operates as a discharge of the insolvent from his debts to such creditors — a discharge as complete as is possible under a bankrupt law. An assignment containing a provision of this kind would have been in many, perhaps in most, of the States void at common law. *Grover v. Wake-man*, 11 Wend. 187; *Ingraham v. Wheeler*, 6 Conn. 277; *Atkinson v. Jordan*, 5 Hamm. 293; *Burrill on Assignments*, 232 to 256. As was said in *Conkling v. Carson*, 11 Ill. 503: "A debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to provide for a preference by assigning his effects; but he is not permitted to say to any of his creditors that they shall not participate in his present estate, unless they release all right to satisfy the residue of their debts out of his future acquisitions." In *Brashear v. West*,

7 Pet. 608, an assignment containing a provision of this kind was upheld with apparent reluctance solely upon the ground that in Pennsylvania, where the assignment was made, it had been treated as valid. If the assignment contain this feature, the fact that it is executed voluntarily and not *in invitum* is not a controlling circumstance. In some States a foreign assignee under a statutory assignment, good by the law of the State where made, may be permitted to come into such State and take possession of the property of the assignor there found, and withdraw it from the jurisdiction of that State in the absence of any objection thereto by the local creditors of the assignor; but in such case the assignee takes the property subject to the equity of attaching creditors, and to the remedies provided by the law of the State where such property is found.

A somewhat similar statute of Wisconsin was held to be an insolvent law in *Barth v. Backus*, 140 N. Y. 230, and an assignment under such statute treated as ineffectual to transfer the title of the insolvent to property in New York, as against an attaching creditor there, though such creditor was a resident of Wisconsin. A like construction was given to the same statute of Wisconsin in *Townsend v. Coxe*, 151 Ill. 62. It was said of this statute (and the same may be said of the statute under consideration), "It is manifest from these provisions that a creditor of an insolvent debtor in Wisconsin, who makes a voluntary assignment, valid under the laws of that State, can only avoid a final discharge of the debtor from all liability on his debt, by declining to participate in any way in the assignment proceedings. He is, therefore, compelled to consent to a discharge as to so much of his debt as is not paid by dividends in the insolvent proceedings or take the hopeless chance of recovering out of the assets of the assigned estate remaining after all claims allowed have been paid." To the same effect are *Upton v. Hubbard*, 28 Conn. 274; *Paine v. Lester*, 44 Conn. 196; *Weider v. Maddox*, 66 Tex. 372; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477; *Boese v. King*, 78 N. Y. 471.

In *Taylor v. Columbia Insurance Co.*, 14 Allen, 353, it is broadly stated that "when, upon the insolvency of a debtor, the law of the State in which he resides assumes to take his property out of his control, and to assign it by judicial proceedings, without his consent, to trustees for distribution among his creditors, such an assignment will not be allowed by the courts of another State to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction." But the weight of authority is, as already stated, that it makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent or upon the voluntary application of the insolvent himself. The assignee is still the agent of the law, and derives from it his authority. *Upton v. Hubbard*, 28 Conn. 274.

While it may be true that the assignment in question is good as between the assignor and the assignee, and as to assenting creditors, to

pass title to property both within and without the State, and, in the absence of objections by non-assenting creditors, may authorize the assignee to take possession of the assignor's property wherever found, it cannot be supported as to creditors who have not assented, and who are at liberty to pursue their remedies against such property of the assignor as they may find in other States. *Bradford v. Tappan*, 11 Pick. 76; *Willitts v. Waite*, 25 N. Y. 577; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, and cases above cited.

We are therefore of opinion that the statute of Minnesota was in substance and effect an insolvent law; was operative as to property in Massachusetts only so far as the courts of that State chose to respect it, and that so far as the plaintiff, as assignee of the D. D. Merrill Company, took title to such property, he took it subservient to the defendants' attachment. It results that the property of the D. D. Merrill Company found in Massachusetts was liable to attachment there by these defendants, and that the courts of Minnesota are bound to respect the title so acquired by them.

The second question must therefore be answered in the negative, and as this disposes of the case, no answer to the first question is necessary.¹

BLAKE v. McCLUNG.

SUPREME COURT OF THE UNITED STATES. 1898.

[*Reported 172 United States, 239.*]

HARLAN, J. ² THE Embreeville Freehold Land, Iron and Railway Company, Limited — to be hereafter called the Embreeville Company — was a corporation organized under the laws of Great Britain and Ireland for mining and manufacturing purposes. In 1890 it registered its charter under the provisions of the above statute, and established a manager's office in Tennessee. It purchased property and did a mining and manufacturing business there, transacting its affairs in this country at and from its Tennessee office.

On the 20th day of June, 1893, C. M. McClung & Co. and others filed an original general creditors' bill in the Chancery Court of Washington County, Tennessee, against this company and others, alleging its insolvency and default in meeting and discharging its current obligations; charging that it had made a conveyance in trust of certain personal property in fraud of the rights of its other creditors, and asking the appointment of a receiver and the administration of its affairs

¹ *Acc.* *Townsend v. Cox*, 151 Ill. 62, 37 N. E. 689; *Franzen v. Hutchinson*, 94 Ia. 95, 62 N. W. 698; *Barth v. Backus*, 140 N. Y. 230, 35 N. E. 425. *Contra*, *Whitman v. Mast Buford & Burwell Co.*, 11 Wash. 318, 39 Pac. 649. — Ed.

² Part of the opinion is omitted. — Ed.

as an insolvent corporation. The court took jurisdiction of the corporation, sustained the bill as a general creditors' bill, appointed a receiver of its property in Tennessee, administered its affairs in that State, and passed a decree adjudicating the rights and priorities of certain creditors.

No question is made in respect to the amount due to any one of the creditors whose claims were presented.

The company maintained its home office in London, its managing director resided there, and after this suit was instituted liquidation under the Companies' Acts of Great Britain was there ordered and begun.

There were holders of debentures executed by the British company whose claims were not specifically adjudicated in the decree below. The original debenture issue amounted to \$500,000, and another issue, subsequent in time, and in respect of which priority in right was claimed, amounted to \$125,000. All the holders of those issues are non-residents of Tennessee and of the United States. There was also a general trade indebtedness aggregating about \$90,000 due by the company to residents of Great Britain. Those claims were specifically adjudicated by the decree.

Among the creditors of the company at the time this suit was instituted were the plaintiffs in error, namely: C. G. Blake, whose residence and place of business was in Ohio; Rogers, Brown & Company, the members of which also resided in Ohio and carried on business in that State; and the Hull Coal & Coke Company, a corporation of Virginia. In the intervening petitions filed by those creditors it was averred that the plaintiffs in the general creditor's bill, residents of Tennessee, claimed priority of right in the distribution of the assets of the insolvent corporation over other creditors of the corporation "citizens of the United States, but not of the State of Tennessee;" and that the said statute was unconstitutional so far as it gave preferences and benefits to the plaintiffs or other citizens of Tennessee over the petitioners or other citizens of the United States. . . .

The cause was carried to the Supreme Court of Tennessee, and so far as the plaintiffs in error are concerned was heard in that court upon appeal from the Chancery Court of Appeals, as well as upon writs of error to the Chancery Court.

It was adjudged by the Supreme Court of the State that the act of March 19, 1877, was in all respects a valid enactment, and not in contravention of paragraph 2 of Article IV. or of the Fourteenth Amendment of the Constitution of the United States, nor in contravention of any other provision of the National Constitution;¹ that all of the

¹ Section 5 of this act provides "That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities, and engagements of the said corporations, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements, and contracts. Nevertheless, creditors who may be residents

holders and owners of the debenture bonds of the Embreeville Company were simple contract creditors of the company, and stood upon the same footing with reference to the distribution of its assets as all of its other creditors who "reside out of the State of Tennessee," whether they be residents of other States or of the Kingdom of Great Britain; that all of the creditors of the Embreeville Company "who resided in the State of Tennessee" are entitled to priority of payment out of all of the assets of said company, both real and personal, over all of the other creditors of said company who do not reside in the State of Tennessee, whether they be residents of other States of the United States or of the Kingdom of Great Britain; that all of the creditors of the Embreeville Freehold Land, Iron & Railway Company who reside out of the State of Tennessee, whether they reside in other States of the United States or in the Kingdom of Great Britain, have the right and must share equally and ratably in the distribution of said funds of the said company after the residents of the State of Tennessee shall have been first paid in full.

The plaintiffs in error contend that the judgment of the State court, based upon the statute, denies to them rights secured by the second section of the Fourth Article of the Constitution of the United States providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," as well as by the first section of the Fourteenth Amendment, declaring that no State shall "deprive any person of life, liberty, or property without due process of law," nor "deny to any person within its jurisdiction the equal protection of the laws." . . .

By the Statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that State. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other States to deal with that corporation. The State did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee or should not transact business with citizens of other States. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of busi-

of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements, and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition."

ness in that State. But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other States, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should first be applied to meet its obligations to residents of that State, although liability for its debts and engagements was "to be enforced in the manner provided by the law for the application of the property of natural persons to the payment of their debts, engagements, and contracts." But, clearly, the State could not in that mode secure exclusive privileges to its own citizens in matters of business. If a State should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that State over the claims of individual creditors, citizens of other States, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens of other States as such, and because they were such, privileges granted to citizens of the State enacting it. Can a different principle apply, as between individual citizens of the several States, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the power to contract with citizens residing in States other than the one in which it is located?

It is an established rule of equity that when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors (*Graham v. Railroad Co.*, 102 U. S. 148, 161) — not simply of stockholders and creditors residing in a particular State, but all stockholders and creditors of whatever State they may be citizens. In *Wabash, St. Louis &c. Railway Co. v. Ham*, 114 U. S. 587, 594, it was said that the property of a corporation was a trust fund for the payment of its debts, in the sense that when the corporation was lawfully dissolved and all its business wound up, or when it was insolvent, all its creditors were entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. In *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 385, it was observed that a private corporation, when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exists in favor of the creditors of a partnership after becoming insolvent, and that in such case a lien and trust will be enforced by a court of equity in favor of creditors. These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that State, without making any distinction between them. Yet the courts of that State are forbidden, by the statute in question, to recognize the right in equity of

citizens residing in other States to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that State.

We hold such discrimination against citizens of other States to be repugnant to the second section of the Fourth Article of the Constitution of the United States, although, generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States. . . .

As to the plaintiff in error, the Hull Coal & Coke Company of Virginia, different considerations must govern our decision. It has long been settled that, for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the State creating such corporation; *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 2 How. 497; *Covington Drawbridge Co. v. Shepherd & Co.*, 20 How. 227, 232; *Ohio & Miss. Railroad Co. v. Wheeler*, 1 Black, 286, 296; *Steamship Co. v. Tugman*, 106 U. S. 118, 120; *Barrow Steamship Co. v. Kane*, 170 U. S. 100; and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the State under whose laws it was organized. But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." *Paul v. Virginia*, 8 Wall. 168, 178, 179; *Ducat v. Chicago*, 10 Wall. 410, 415; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 573. The Virginia corporation, therefore, cannot invoke that provision for protection against the decree of the State court denying its right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of the British corporation in the hands of the Tennessee court.

Since, however, a corporation is a "person" within the meaning of the Fourteenth Amendment (*Santa Clara County v. Southern Pacific Railroad Co.*, 118 U. S. 394, 396; *Smyth v. Ames*, 169 U. S. 466, 522), may not the Virginia corporation invoke for its protection the clause of the amendment declaring that no State shall deprive any person of property without due process, nor deny to any person within its jurisdiction the equal protection of the laws?

We are of opinion that this question must receive a negative answer. Although this court has adjudged that the prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the State, to its legislative, executive, and judicial authorities (*Ex parte Virginia*, 100 U. S. 339, 346-347; *Yick Wo v. Hopkins*, 118 U. S. 356, 373;

Scott v. McNeal, 154 U. S. 34, 45, and Chicago, Burlington &c. Railroad v. Chicago, 166 U. S. 226, 233), it does not follow that, within the meaning of that amendment, the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other States or countries disputed. It was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that State. It had notice of the proceedings in the State court, became a party to those proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the second section of Article IV. of the Constitution of the United States relating to the privileges and immunities of citizens in the several States, as its co-plaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the state court erred in its decree in reference to that corporation, the latter cannot be said to have been thereby deprived of its property without due process of law within the meaning of the Constitution. It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no State shall "deny to any person within its jurisdiction the equal protection of the laws." That prohibition manifestly relates only to the denial by the State of equal protection to persons "within its jurisdiction." Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words "within its jurisdiction," while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, "within its jurisdiction," it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State. Certainly, when the statute in question was enacted the Virginia corporation was not within the jurisdiction of Tennessee. So far as the record discloses, its claim against the Embreeville Company was on account of coke sold and shipped from Virginia to the latter corporation at its place of business in Tennessee. It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the amendment, simply by presenting its claim in the State court and thereby becoming a party to this cause. Under

any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the people, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of the State of Tennessee (although such private corporations may be creditors of a corporation doing business in the State under the authority of that statute), to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the "equal protection of the laws," secured by the Fourteenth Amendment to persons within the jurisdiction of the State, however unjust such a regulation may be deemed.

What may be the effect of the judgment of this court in the present case upon the rights of creditors not residing in the United States, it is not necessary to decide. Those creditors are not before the court on this writ of error.

The final judgment of the Supreme Court of Tennessee must be affirmed as to the Hull Coal & Coke Company, because it did not deny to that corporation any right, privilege, or immunity secured to it by the Constitution of the United States. (Rev. Stat. § 709.) As to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.

FULLER, C. J., and BREWER, J., dissenting.

CHIPMAN v. MANUFACTURERS' NATIONAL BANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892.

[Reported 156 Massachusetts, 147.]

HOLMES, J. The plaintiffs are assignees in insolvency of Dudley Hall & Co. The principal defendant, a national bank doing business in Boston, is a creditor of Dudley Hall & Co. Hall & Co. were adjudged insolvent on March 23, 1891. The assignment to the plaintiffs was made on April 9, 1891. On March 10, 1891, the defendant attached teas in New York in an action there, and it also attached land in Maine in an action there. The teas and the land afterwards were attached by creditors foreign to Massachusetts, upon claims more than sufficient to exhaust the property, so that no part of it or its proceeds will come to the assignees unless the suits are carried on and the defendant's attachments are preserved for their benefit. The object of this suit is to compel the defendant bank to carry on the suits or to allow the plaintiffs to carry them on, the defendant bank of course being indemnified, and to turn over to the plaintiffs whatever may be collected on execution.

Dehon *v.* Foster, 4 Allen, 545, goes further than the English cases in form. *Ex parte* D'Oree, and *Ex parte* Le Mesurier, 8 Ves. 82. But the principle upon which it goes has the same limit as that of the English cases. It is not that the law will prevent a domestic creditor from getting paid in full unless all do. Whatever may be the law where a creditor who has got an advantage abroad seeks to prove under an English commission, the "principle does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund," "which otherwise would have been available for the payment of all the creditors," at least when he takes no part in the English proceedings. Cockerell *v.* Dickens, 3 Moore P. C. 98, 132; Banco de Portugal *v.* Waddell, 5 App. Cas. 161, 167; Selkrig *v.* Davies, 2 Dow, 230, 249; s. c. 2 Rose, 291.

As the debtor is subject to the jurisdiction of the court, of course it would be possible to make all his property, wherever situated, available for the creditors by compelling him to convey it to the assignees, and a creditor subject to our laws not only might be refused the right to prove unless he surrendered any advantage which he had obtained elsewhere and which otherwise the debtor might have been compelled to convey, but might be compelled by an independent proceeding to make such surrender. That, however, is not what the principle of Dehon *v.* Foster means. It only denies to the creditor the right to retain an advantage in respect of property which by force of the insolvent proceedings, or at least according to the manifest theory of the insolvent law, would have passed to the assignee but for the creditor's act. Dehon *v.* Foster was put on the ground that personal property situated in Pennsylvania, but belonging to a debtor domiciled here, was intended by the statute to pass, and would pass, to his assignee in insolvency. 4 Allen, 545, 552, 554; Selkrig *v.* Davies, 2 Dow, 230, 249; s. c. 2 Rose, 291, 318. A proposition which although it has not commanded unqualified assent (Crapo *v.* Kelly, 16 Wall. 610, 622, and Wharton, Conf. of Laws, § 390 *a*), is law in England (Dicey, Domicil, Rule 63), and which would seem to be sound if assignees in insolvency are to be regarded as successors *per universitatem*, like executors or husbands at common law upon marriage. Royal Bank of Scotland *v.* Cuthbert, 1 Rose, 462, 481; Selkrig *v.* Davies, 2 Dow, 230, 248; s. c. 2 Rose, 291, 317. See Mechanics' Savings Bank *v.* Waite, 150 Mass. 234, 235; Westlake's Priv. Int. Law (3d ed.), pp. 31, 32, 152-157 (§§ 134-140), 185 (§153); Wharton, Conf. of Laws, §§ 553, 555. *Bonorum emptor ficto se herede agit*, Gaius, IV. § 35.

But all the cases agree that an assignment in bankruptcy does not reach foreign lands, and accordingly the reasoning in Dehon *v.* Foster is confined to personal property; and in England it is held that a creditor will not be disturbed in an attachment of such lands, because the principle on which he is interfered with is limited as stated in the language already quoted from the decision. Cockerell *v.* Dickens, *ubi supra*. For the same reason, the bankrupt himself will not be com-

pelled to convey such lands unless the words of the act plainly require it. *Selkrig v. Davies*, 2 Dow, 230, 245 ; s. c. 2 Rose, 291, 311, 312.

To a majority of the court it seems to follow that the plaintiffs cannot prevail in the present case even as to the New York teas. The Massachusetts creditor may be prevented from doing anything to hinder the assignment from having the effect which our statutes intend it to have, but that is all. The assignees cannot claim advantages which would not have accrued to them apart from the creditor's action, or found a right simply on the fact that the creditor is within the jurisdiction and so personally subject to the orders of the court. It is not enough to justify a decree to show that the court has the physical power to make it compulsory. Of course the defendant will not be enjoined for the merely negative purpose of preventing it from getting payment, but only to enable the Massachusetts creditors to get the benefit of its attachment. The only ground on which they could claim the benefit of the attachment is the assignment. The assignment is not of the defendant's attachment, but of the property. It would be paramount to the attachment in equity here if there was a conflict and the attachment prevented the assignees from getting the property, but the attachment is not what prevents their getting the property, since the other attachments will do that even if this one should be declared void. It would be going beyond the intended scope of the assignment to treat it as substituting the assignees to the benefit of attachments outside of the State which they do not desire to vacate. Pub. Sts. c. 157, § 47, on its face is only intended to apply to proceedings in this State. *Bill dismissed.*¹

BATCHELLER v. NATIONAL BANK OF THE REPUBLIC.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892.

[Reported 157 Massachusetts, 33.]

MORTON, J. These cases were reserved by a single justice, on the bills, answers, and agreed facts, for the full court. We do not propose to consider whether the plaintiffs have a *locus standi* in either case. We assume for the purposes of these cases that they have. The cases relate to the right of the defendant to prove two notes in insolvency against the estate of the plaintiffs, Alfred H. and Francis Batcheller, who were formerly partners as E. & A. H. Batcheller and Company. They are a part of six notes originally held by the defendant against the firm. A question as to the right of the defendant to retain as against the assignees in insolvency of the firm the proceeds of four of

¹ See *Jenks v. Ludden*, 34 Minn. 482, 27 N. W. 188; *Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73; *Crippen v. Rogers*, 67 N. H. 207, 30 Atl. 346. — Ed.

them was before this court in *Proctor v. National Bank of the Republic*, 152 Mass. 223, and was decided in favor of the defendant. In that case it was said that the bill could not be maintained for the purpose of enjoining the defendant from proving against the estate in insolvency of said firm the notes which it still held, — which are the two now before us, — or of deciding the terms on which, if at all, such notes might be proved, because the bill was not brought under the Pub. Sts. c. 157, § 15; and that, if the defendant intended to offer the notes for proof, it was for the court of insolvency to pass upon the allowance of them before the supervisory power of this court could be invoked. The notes have since been offered in proof, and have been allowed by the insolvency court. The plaintiffs now pray that said proof may be expunged unconditionally, or that it may be expunged unless the defendant will pay into the insolvency court or to the plaintiffs the money received from the notes aforesaid, or that the defendant may be enjoined from collecting on said notes more than, with what it has already received as the proceeds of the four notes, will amount to seventy-five per cent of the six notes.

It is only necessary to consider the facts so far as they relate to the cases now presented. It appears that said firm was in September, 1889, adjudged insolvent on its own petition, and that at the same time it filed a proposal to pay in composition to its creditors all debts and claims in full that were entitled to priority, and seventy-five per cent on all other claims. This was duly confirmed by the insolvency court, and the full amount required for its immediate payment in cash was deposited in court within the time limited therefor, and the said Batchellers were duly discharged from all firm debts. The assignees thereupon, in accordance with an order of the insolvency court, conveyed to said Batchellers all their right, title, and interest in and to their joint estate, except the debt of over \$20,000 due from Simkinson and Company of Cincinnati in the State of Ohio, and the suit then pending in favor of the assignees against the defendant, which is the one above referred to. The funds necessary to carry out the composition were advanced by the plaintiff Proctor, and to secure him as far as possible a mortgage on this property was given to him by the plaintiffs Batcheller, and by a sale of it and otherwise a part of said advance has been repaid, but a part still remains unpaid. To secure him still further, the plaintiffs Batcheller made in August, 1890, an assignment to him of all moneys deposited as aforesaid in the insolvency court which should remain there on October 20, 1890. The answer in each case alleges, and it must be taken as true, that after the payment of the balance due to Mr. Proctor there will be a surplus. If, therefore, either of the prayers of the plaintiff should be granted in either case, the other creditors of the firm will not be benefited, for they have all received their percentage, and the debtors have been discharged. Mr. Proctor will be not benefited, for his security is already more than sufficient to pay the balance due him. The result will be to increase, at the

cost of the defendant, the amount which the debtors will themselves finally realize. For even if it should receive seventy-five per cent on the two notes, the defendant will not thereby obtain payment in full of all its notes. We have been referred to no case in which the principle of equality of distribution, which the plaintiffs rightly contend forms the basis of insolvency proceedings, has been carried so far.

The English courts hold that a commission in bankruptcy passes the title to the personal property of the bankrupt wherever it is situated; and, therefore, if a foreign creditor, who has, after the issuing of the commission obtained by attachment or other legal proceedings, payment in part of his claim out of personal property of the bankrupt, seeks to share with English creditors in the distribution of the bankrupt estate, and to prove in the English bankruptcy court for the balance of his claim, that he should before being allowed to do so account for what he has thus received. For the same reason, if an English creditor obtains in a foreign jurisdiction payment of part of his claim by proceedings begun after the commission in bankruptcy was issued, he will not only be obliged to account for what he has received before he will be allowed to share with other creditors in the bankrupt estate, and to prove for the balance of his claim, but will be liable to the assignees for the amount so received. *Sill v. Worswick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182; *M'Intosh v. Ogilvie*, 4 T. R. 193 *n*; *Ex parte D'Obree*, and *Ex parte Le Mesurier*, 8 Ves. 82; *Solomons v. Ross*, 1 H. Bl. 131, *n*; *Jollet v. Deponthieu*, 1 H. Bl. 132, *n*; *Neale v. Cottingham*, 1 H. Bl. 133, *n*; *Phillips v. Hunter*, 2 H. Bl. 402; *Selkrig v. Davies*, 2 Dow, 230, and 2 Rose, 291; *Cockerell v. Dickens*, 3 Moore, P. C. 98. *In re Bugbee*, 9 Nat. Bank. Reg. 258, might well stand on the ground thus indicated, which has much in reason to commend it.

On the other hand, it is held in England that if either the foreign or the domestic creditor has obtained his payment out of property which would not pass under the commission in bankruptcy, as, for instance, real estate in a foreign jurisdiction, or if the attachment was made before the commission issued, then he will not be obliged to account, but will be permitted to prove unconditionally for the balance of his claim. Cases *supra*. That is, as we understand it, the principle of the English cases is that a domestic creditor who has obtained payment in part of his claim out of property of the debtor in a foreign jurisdiction for which he would not be accountable to the assignee, will be allowed to prove the balance of his claim without being compelled to account for what he may have thus received. We are of opinion that this principle applies to the case at bar. In *Proctor v. National Bank of the Republic*, *ubi supra*, this court held that the defendant was not accountable to the assignee for the proceeds of the sale of the other notes, and that it could properly and lawfully retain them as against the assignee. To require it now to account for them would be in effect to compel

it to account to the plaintiffs, who are the successors of the assignees, for that to which it was there held the assignees had no claim. See also *Chipman v. Manufacturers' National Bank*, 156 Mass. 147.

We think the proof was rightfully allowed, and that the

Petitions must be dismissed.

A. v. B.

SUPREME COURT OF AUSTRIA. 1877.

[*Reported 15 Sammlung von Civilrechtlichen Entscheidungen*, 83.]

ON the 11th of February, 1877, proceedings in bankruptcy were instituted in the Commercial Court of Buda-Pesth against the firm of Ferdinand B., there registered; and accordingly an inventory of the movables of the firm in Vienna was filed in the Commercial Court of Vienna, where also the firm was registered, but not as a subordinate branch. On February 16, 1877, A., a creditor of the firm, petitioned in the Commercial Court of Vienna for the administration in bankruptcy of the property of the firm, according to section 198 of the Commercial Code, alleging that the debtor was registered in the Commercial Court of Vienna, and had his usual residence there, and if the administration of the estate was confined to the Commercial Court of Buda-Pesth the numerous and most interested Austrian creditors would be under the necessity of proving their claims at Buda-Pesth and seeking payment from the estate, which would be most inconvenient.

Upon this petition, laying section 60 of the Commercial Code out of the case, and with reference solely to section 193 of the Code, since a mercantile estate is concerned, the Commercial Court of Vienna undertook the administration of the entire movable property, wherever found, of the banker and commission-merchant, Ferdinand B., registered under the firm name Ferdinand B., and of his immovable property situated within the jurisdiction of the Commercial Code, so notified the Commercial Court of Buda-Pesth, and denied to the Court of Bankruptcy of Buda-Pesth possession of the entire bankrupt estate situated in Vienna.

The assignee in bankruptcy appointed in Buda-Pesth and the bankrupt appealed. The Court of Appeal affirmed the decision of the Commercial Court of Vienna.¹ The assignee appealed to the Supreme Court. The Supreme Court held that the administration of the entire estate, undertaken by the Commercial Court of Vienna, should be limited to the property outside the dominions of the Hungarian Crown.

¹ The opinion of the Court of Appeal and the argument of the appellant in the Supreme Court are omitted. — Ed.

THE COURT. By section 193 of the Commercial Code of December 25, 1868, a bankrupt mercantile estate is to be taken and administered by the court having commercial jurisdiction in the district where the bankrupt had his domicile. From this universal rule it follows, that since only the registration of the firm and the domicile is decisive, only one Commercial Court is designated which has jurisdiction to act in the administration of the estate. This construction is moreover supported by the considerations that the action of such a court is necessarily required in the interest of the domestic creditors, and provisions are found in the statute which are conditioned upon the action of such a Commercial Court and are only possible through such action. The Commercial Court of Vienna therefore has jurisdiction to administer the estate. But since on February 11, 1877, the Commercial Court of Buda-Pesth undertook the administration in bankruptcy of all the movable property of the firm Ferdinand B. situated within the dominions of the Hungarian Crown, and according to section 11 of Article 22 of the Acts of the year 1840, and section 1 of part IV. of the Decree of the *Judex-Curial*, in cases where bankruptcy is declared both in a Hungarian and in a foreign court the jurisdiction of the latter with regard to the universal property is confined to the movable property situated outside Hungary, but the administration in bankruptcy is undertaken by the Commercial Court of Vienna for the movable property of Ferdinand B. wherever situated, the decision of the lower court will be affirmed with the partial correction, that only the movable property situated outside the dominions of the Hungarian Crown shall be administered.

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PIAGGIO v. DACIER.

COURT OF CASSATION, TURIN, 1884.

[Reported 19 *Annali della Giurisprudenza Italiana*, 1, 360.]

PIAGGIO & Son except to the permission to the syndics Mauraille, Giuchard, and Dacier to stand in judgment in this kingdom as representatives of the rights of E. Brett in liquidation, because they have not secured executory force for the decree of the Tribunal of Commerce of Marseilles of January 9, 1879, by which they were appointed to administer and liquidate his property, which decree was produced by them in this case without the previous investigation of the merits required by Article 941 of the Code of Civil Procedure.

The sentence appealed from examined the nature, object, and scope of his decree, held that it required the mere approval by the court of the appointment in the case of Brett in composition with his creditors of Mauraille, Guichard, and Dacier to administer and liquidate his

affairs, and that it was therefore a question of a simple judicial mandate; and in fine, for this reason, it adjudged that the decree in question did not need to be subjected to an examination on the merits in order to be produced in the courts of this kingdom by the liquidators for the mere purpose of proving their quality as representatives of the mercantile house of Brett.

In so holding the court did not transgress any article of the Fundamental Statute of the kingdom, but correctly interpreted and applied the special provisions applicable, contained in title 12, book 3, of the Code of Civil Procedure. In fact, from the context and from the literal provisions of this title, compared with Article 559, the court well said that a judgment needed to be rendered executory in the kingdom after full investigation of the merits only if some consequence is to follow from it; now when the only question is of standing in judgment as syndic, the decree produced to prove the appointment, even if it emanates from a foreign authority, does not need an investigation of the merits.

Jurisprudence always recognizes the distinction, which should be made in every case in the application of the law cited, between the executory force of an act and its legal existence, as is found distinctly in the same law, which in requiring investigation of the merits always refers to the executory force of acts. Reason and authority alike prove it. To give executory force to a decree or any foreign act the courts of a country must necessarily intervene and exercise the power of government; while on the other hand when the intervention of power, of the arm of local authority, is not required, the foreign judgment may exist and produce its effects, the authentic act have probative value, without the necessity of any authorization or investigation of the merits.

The judgment appealed from having proceeded upon these legal principles, it escapes adverse criticism in this respect. For these reasons,

Appeal rejected.

STEIN v. TILLOT.

COURT OF BORDEAUX. 1885.

[*Reported Dalloz*, 1888, 2, 290.]

THE COURT. According to Article 15 of the Civil Code, a Frenchman may be sued in a French court, even by a foreigner, upon an obligation contracted abroad. It is therefore of no importance that the proceedings against Tillot in this case were instituted by a foreigner. The right of suing in a French court for payment of a commercial debt necessarily implies that of applying for a declaration of bankruptcy, which is only the method of proceeding upon default

of the payment by a merchant of his commercial debts. When a debtor thus sued has no domicile or usual residence in France, the suit should be brought before the tribunal of the place where he has an established place of business, in which he has agents to represent him and a stock of merchandise for business purposes. Such was the situation of Tillot at Bordeaux, where he was represented by a manager who had the care of his interests, and where, at the time proceedings were instituted in the Tribunal of Commerce of that city, he had merchandise of various sorts worth more than 43,000 francs.

On the other side it is proved that Stein Brothers were creditors of Tillot to the amount of 3,629 francs for the sale of merchandise for which they had never been paid; many creditors have failed to obtain satisfaction, and the cessation of payments by Tillot is absolute, as he admitted himself by applying to the court of bankruptcy. It is of no importance that Tillot, the appellants allege, was declared bankrupt in the island of Guernsey. In the absence of a treaty, this judgment could be executed in France only after an examination on the merits, in conformity with Articles 2123 and 2128 of the Civil Code and 546 of the Code of Procedure.

GERSON v. OZERÉ.

COURT OF PARIS. 1886.

[*Reported Dalloz*, 1888, 2, 291.]

THE COURT. The documents produced to the court show that Gerson, an American citizen, carried on business at Paris as a commission merchant, with an office and store distinct from his dwelling-house at 32 Rue de Paradis-Poissonnière, where he engaged in the business of buying merchandise for resale. In April, 1885, he gave up this establishment, leaving a liability of more than 20,000 francs, mostly made up of mercantile debts. The judicial proceedings which, the appellant says, have been carried out in the United States of America as a result of his failure in that country, offer no obstacle to a declaration of his bankruptcy in France, the seat of his business, for the security of the rights of French creditors who have dealt with him.

*Appeal dismissed.*¹

¹ *Acc.* 12 Clunet 178 (Orleans, 27 Mar. '85). — Ed.

SYNDIC OF MÉZIÈRES v. BANK OF ALSACE AND
LORRAINE.

COURT OF NANCY. 1887.

[Reported *Dalloz*, 1887, 2, 289.]

MÉZIÈRES, banker at Blâmont (Meurthe-et-Moselle) had three business branches in Alsace-Lorraine, and his bankruptcy was decreed abroad on August 11, 1886, as it had been in France on the 9th of the same month. Two syndics were named and two estates created, each with its own assets and liabilities. Stieve, syndic of the bankruptcy in Alsace-Lorraine, sued for the recovery of a debt due to the Sarrebourg branch by the branch at Nancy of the Bank of Alsace-Lorraine, which has its principal establishment at Strasbourg. He is competent to bring this suit, even though the decree appointing him has not been declared executory in France. It is not a question of giving to this judgment effects for which Article 546 of the Code of Civil Procedure declares an *exequatur* necessary, but only (according to the rule *locus regit actum*) of establishing the existence of a fact, namely, the appointment of Stieve as syndic of a bankruptcy and the legal mandate confided to him of getting in the assets. The Tribunal of Commerce of Nancy, place of location of the defendant's bank, was competent to pass upon the suit brought by Stieve, since the object of the suit did not directly concern the administration of the bankruptcy; and the Tribunal of Lunéville, within the district of which the bankruptcy had been decreed in France, had no jurisdiction.

The judgment being set aside, the court is empowered to pass upon the merits, by application of Article 473 of the Code of Civil Procedure, since the cause is ripe for judgment. It makes no difference that the disputed jurisdiction of the judges of first instance was final; for Article 473, already cited, makes no distinction, and the determination is required, in this case, in the interest of celerity and of economy.

Mézières having been declared bankrupt both in France and abroad, his creditors are referred to one of two estates, according as they have dealt with the French house or the branch in Lorraine. Each of these estates, represented by a syndic, is administered as to its assets and liabilities according to the proofs in his possession. Stieve finds in the account current opened by the branch of the Bank of Alsace-Lorraine with the Sarrebourg house, and closed August 10, 1886, as a result of the bankruptcy, a balance due of 1,135 fr. 26 cent., for the recovery of which, with interest since accrued, he brings suit. The defendant bank in vain claims to set off against this debt the balance in its favor of another account current opened with the Blâmont house, and intended by the common consent of the bankrupt and the bank of Alsace-Lorraine to apply to operations distinct from

those undertaken with the Sarrebourg house; since by the terms of Article 446 of the Code of Commerce a set-off ceased to be possible from the moment when the double bankruptcy closed both accounts and fixed a balance due to or by the two distinct estates.

For these reasons the court permits the appeal of Stieve as syndic from the judgment of the Tribunal of Commerce of Nancy of February 18, 1887; declares that the tribunal was competent to entertain the suit which had been regularly brought; and upon the merits condemns the bank of Alsace-Lorraine to pay to Stieve the sum of 1,135 fr. 26 cent., for the reasons set out in this judgment, with interest at 6 per cent since August 10, 1886.

WELLS v. BANK OF CHRISTIANIA.

SUPREME COURT OF NORWAY. 1887.

[*Reported 16 Clunet, 920.*]

WELLS, an Englishman, was engaged in the lumber business both in England and at Porsgrund in Norway. Having several important bills to pay, he entered into an agreement with two of his creditors at Christiania, December 8, 1881, by the terms of which his property in Norway was assigned to a third party to take it, turn it into money, and give half the proceeds to the two Norwegian creditors. Wells returned to England, and was there declared bankrupt, December 12, 1881, by the Bankruptcy Court of Yorkshire. The Bankruptcy Court of Porsgrund was petitioned by Wells, December 31, to take and administer his Norwegian property in bankruptcy; this petition was not granted. A new petition, received February 2 from the English syndic, was granted. The Bankruptcy Court of Porsgrund then proceeded against the two Norwegian creditors for an avoidance of the agreement of December 8, 1881, and for the amount already realized from a sale of the property. The Supreme Court at Christiania gave judgment against the creditors.

THE COURT. The agreement in question is subject to Articles 44 and 45 of the Norwegian law of bankruptcy. Though the creditors were to receive the money realized from the property at all events, yet the agreement is an abnormal mode of payment which is made void by the law of bankruptcy. Even if the law of bankruptcy were inapplicable, the agreement would be void by application of the Norwegian Code, 5, 13, 44, for the two creditors were attempting thus to procure a preference over the other creditors, knowing the debtor to be insolvent; in fact, one of them had tried to put him into bankruptcy.

In the second place, the declaration of bankruptcy in England produces its effects in Norway and extends to property situated in

this country. Therefore the declaration made in England on December 12, might be taken as the *dies ad quem* of the eight weeks preceding the bankruptcy, which according to the Norwegian law of bankruptcy forms the term during which conveyances are voidable. Besides, no Norwegian Court has jurisdiction to put into bankruptcy this debtor's property. According to the ordinance of June 21, 1793, Article 1, bankruptcy proceedings should be undertaken by the court in the personal forum of the debtor. Since there is no such forum in Norway, the bankruptcy cannot be instituted in a Norwegian court, but by the foreign court of the domicil.

Finally, the period of eight weeks is to be counted from day to day, not from hour to hour.¹

KLINGSLAND v. TOM.

HIGH COURT OF THE NETHERLANDS. 1888.

[*Reported Nederlandsche Rechtspraak*, 1888, 344.]

THE plaintiff is the holder of a bill of exchange accepted by the firm of C. & J. Tom of Warsaw whilst the defendant was a member of the now dissolved firm. The plaintiff as holder of the bill proved it in the bankruptcy, and obtained a dividend of 10 per cent. The defendant, who some years ago settled in Amsterdam, was legally sued on the 24th of December, 1887, for the balance of 90 per cent remaining unpaid. The plaintiff further claimed, and the defendant did not deny, that the latter had entered into the business of merchant at Amsterdam, which must be regarded as a hostile position. The plaintiff, not having received payment of the balance due on the bill, demanded that the defendant be declared a bankrupt. The lower court refused to declare the defendant in a state of bankruptcy, partly because it should be proved, as had not been done, that the plaintiff who lived at Warsaw and by the proof of his claim in the bankruptcy had subjected himself to the forced equality of the *concursum creditorum* and to the legal results in that place, had the right (contrary to the provisions of the law of the Netherlands) to demand payment of the remaining 90 per cent of the bill from the individual partner; and partly because the defendant, member of the firm of J. & C. Tom, had already stopped payment before the time of the declaration of

¹ The question whether the assignee or syndic of a bankrupt, appointed at his domicil, has a right to the movable property of the bankrupt everywhere is undecided in countries governed by the Civil Law. That he has, see *Selkrig v. Davies*, 2 Dow, 230; *Re Howse*, 3 Juta, 14; *Perrin v. Turton*, 1 Transv. Prov. 25; 22 Clunet, 157 (Austria, 12 Apr. '93); 26 Clunet, 867 (Milan, 14 Dec. '91). That he has not, see 14 Clunet, 243 (Netherlands, 16 March, '85); 15 Clunet, 126 (Austria, 11 June, '84); 24 Clunet, 420 (Arnheim, 29 April, '95); 26 Clunet, 867 (Genoa, 25 March, '92). — ED.

bankruptcy at Warsaw, and accordingly could not stop payment again at Amsterdam on the 24th of December, 1887.

The Court of Appeal affirmed the decision; and the plaintiff appealed from this judgment to the High Court of the Netherlands.

THE COURT. The decision depends upon whether a bankruptcy pronounced abroad has the same legal results as one pronounced in this country.

The decision of the lower court, that according to the law of the Netherlands the payment by the individual partner of the 90 per cent of the bill still remaining unpaid could not be required, and the decision that owing to the fact that the defendant in 1881 had defaulted in the payment of the whole bill it was impossible to have a new default in payment of part of the bill in 1887, depended upon the hypothesis that the obligation which the defendant had in this country with respect to his debts had been determined by the bankruptcy pronounced at Warsaw in 1881. This hypothesis is unsound. Bankruptcy, being a universal seizure, by judicial decree, of the goods of the debtor, can take effect no further than the jurisdiction of the judge who issues the decree extends. It would be opposed to the independence of the various States if it were possible thereby to hinder foreign judges from taking similar measures when otherwise both competency and occasion for them exist.

CHALE v. ARTOLA.

COURT OF CASSATION, SPAIN. 1894.

[*Reported 75 Revista General, Jurisprudencia Civil, 693.*]

D. JOSÉ MARÍA, D. Jorge, D. Ramón, D. Daniel, and D. Francisco Artola formed on March 19, 1885, in accordance with the French law, a collective commercial association, located at Paris, under the firm name of Artola Brothers, for the term of five years, ending December 31, 1889. The partners were themselves to carry on the business with full powers to use the firm name and to act in all interests of the partnership.

On December 11, 1889, the Tribunal of Commerce of the Seine declared the partnership bankrupt, fixed the date of cessation of payment provisionally at the same date, and named as temporary syndics D. Andrés Julio Chale and D. Alejo Dronín, who were continued as permanent syndics by a judgment of November 24, 1891. In the same court Artola Brothers on December 13, 1889, filed a schedule, including among the assets the copper and cobalt mine called "Profunda," situated in the province of Leon, which was then in litigation in the lower courts on their claim to two-thirds of it, and an appeal pending; the net value of the two-thirds was at least five hundred thousand francs

a year. By sentence of the Tribunal of Assizes of Paris, March 31, 1892, all five brothers Artola were in their absence adjudged guilty of fraudulent bankruptcy, and each, being in contempt, was sentenced to ten years' hard labor.

On the 26th of October, 1889, the brothers Artola claiming to form the mercantile partnership, represented by J. M. Artola in liquidation, appeared in the court of first instance of San Sebastian, praying to be declared in a state of suspension of payment, and accordingly presented a proposition for a composition. D. Andrés Julio Chale as syndic of the bankruptcy in Paris, intervened, alleging the bankruptcy there declared and the schedule filed, protested against the proposed composition, and moved that notice of his protest should be given to the creditors. This motion was denied because D. Andrés Julio Chale did not figure in the list of creditors; and a composition was approved in which it was stipulated that its execution should be secured by the movable property in Spain and by the two-thirds interest in the mine "Profunda," which, pending the decision of the appeal, was to be taken as the property of the brothers Artola.

D. José María and D. Daniel Artola individually had brought suit against D. Ruperto Sanz to recover two-thirds of the mine "Profunda." By sentence of the court of Valladolid, October 23, 1889, the latter was ordered to execute in favor of the demandants a public deed in the terms contained in a certain private document in which he released to each of these brothers one-third interest in said mine and its appurtenances, and upon appeal by D. Ruperto Sanz the judgment was affirmed November 20, 1890. Meanwhile D. Andrés Julio Chale and D. Alejo Dronin filed an intervening petition in which they alleged that the personality of the brothers Artola had terminated by virtue of the bankruptcy decreed in France, and that the syndic who represented this bankruptcy should be substituted in their place. The Supreme Court declared that they had no standing because D. José María and D. Daniel Artola were suing in their own proper right and not as partners in the firm; and since the bankruptcy decreed was that of the partnership and not of any one of the partners, their capacity and personality to carry on suit was unaffected.

On October 2, 1891, D. Andrés Chale and D. Alejo Dronin as syndics named by the Tribunal of Commerce of the Seine for the bankruptcy of the partnership Artola Brothers, domiciled in Paris, jointly brought suit, in the court of first instance of San Sebastian against D. Jorge and D. Francisco Artola as active partners in the firm Artola Brothers and against the parties to the composition made between Artola Brothers and the creditors of D. José María Artola in liquidation, praying to have declared null and of no validity or effect this composition and all acts and contracts made by the defendants in execution and fulfilment of the same, and to have all things restored to the condition in which they were before the composition was entered into, and for the payment of damages and costs. Dilatory

exceptions having been opposed to this demand, an appeal was taken to the court of Pamplona.

The same D. Andrés Julio Chale and D. Alejo Dronín as syndics of the bankruptcy of the partnership Artola Brothers, domiciled at Paris, brought in the court of first instance of La Vicella on March 17, 1892, the suit in which the present appeal is taken; and reciting the facts which have been stated, alleged as the basis of their claim that the legal capacity of persons is governed by the law of their country, and consequently that of the partnership Artola Brothers, domiciled at Paris, and that of the partners who constitute the firm, must be subject to the laws of that republic and to the declaration of its courts and must be governed by them. The decision of this Supreme Court in not admitting the petition of these syndics in the suit for the share of the mine "Profunda" offered, they argued, no obstacle to the present suit; for that was with reference to acts and contracts made before the decree of bankruptcy, and subsequently an important fact occurred, which was the individual decree of bankruptcy of each one of the partners who formed the partnership. One could not say that the syndics had no standing before the Spanish courts until they had obtained an *exequatur* of the decree in bankruptcy; for it was not a question of executing in Spain a judgment of a foreign court, but, on the contrary, of calling for a decree of the Spanish courts in a case where they appeared as representing a foreign juridical entity which, according to the treaty made with France, January 7, 1862, might bring suit in the Spanish courts on the same terms as Spanish citizens. Wherefore they prayed for a decree, first that everything that had been done in the suit brought by D. José María and D. Daniel Artola against D. Ruperto Sanz for a release of two-thirds of the mine "Profunda" and its profits and appurtenances and all acts done in fulfilment of the sentence of this Supreme Court given in that suit should be declared null and of no effect whatever, since the partnership Artola Brothers was declared in bankruptcy; declaring equally null all payments, acts, and contracts made by these parties with respect to the rights declared by the judgment, leaving, therefore, without effect the proceedings, the order of court of March 2, 1891, the settlement of accounts made with Sanz and the payment of the balance due, and secondly that the goods and rights which by virtue of this sentence were decreed to the Brothers Artola should be subjected to the liabilities contracted by them as partners in the firm Artola Brothers; condemning the defendants to take all the measures agreed upon to carry out this decree, to deliver to the plaintiffs all the property referred to in the suit, the income realized from the same, or which may be realized in the future, and to pay damages, with costs, against those opposing the demand.

In opposition to these demands D. José María and D. Daniel Artola appeared and set up in the first place a plea of lack of jurisdiction based on section 1 of Article 53 of the law of Civil Procedure; that the suit was for the execution of the judgment of a foreign court which it

was attempted to enforce in Spain with respect to persons and property there, contrary to the decisions of our own court. To grant the petition necessarily involved the decision of whether or not this judgment was admissible in Spain, and whether or not it had produced effects in this country, which was a matter within the exclusive jurisdiction of the Supreme Court and hence outside that of the court of La Vecilla. This latter court cannot determine the claims of the plaintiffs, for their arguments show that nothing is in question but the enforcement of the declaration of bankruptcy decreed by the French court; although the fact of such declaration is proved in order to indicate the juridical situation in which by virtue of it were placed in Spain, in conformity with the Spanish law, the brothers Artola, their goods in this country, and the validity or nullity of the acts and results in the Spanish courts. The Supreme Court cannot allow this without departing from their preceding decision. The claim of the French syndics, whatever be the form in which it is stated, amounts to determining the effects produced in Spain by the bankruptcy declared by the French tribunals; to making such a declaration of bankruptcy effectual with respect to persons and property in Spain contrary to the decisions of our own courts. Nothing which is asked in this claim can be granted without as a result admitting in Spain the judgment of the French court, — a thing which it is not within the competence of an inferior court to do. Such a court should so decide, declining cognizance of the matter and leaving it to the determination of the Supreme Court.

The second exception of the Brothers Artola was that of personality, based on the decision of this Supreme Court; the third, that of *lis pendens*, setting up the suit pending in the Court of San Sebastian; and finally defect in form of the statement of claim, which had not stated the form of action which was instituted. They prayed that these exceptions should be allowed, and that consequently the claim should be dismissed, with costs.¹

The Civil Chamber of the court of Valladolid having on October 30, 1893, affirmed the judgment, with costs, against the appellants D. Andrés Julio Chale and D. Alejo Dronín, they appealed, in their capacity as syndics named by the Tribunal of Commerce of the Seine for the bankrupt firm of Artola Brothers, domiciled at Paris, with branches at London and elsewhere. The reasons of appeal were: —

First: Article 2 of the Treaty with France of January 7, 1862, having force of law in Spain, which authorizes the subjects of each country to have free access to the courts of the respective countries to sue in defence of a legal right (a provision in harmony with Article 32 of the Royal Decree of November 17, 1852) was infringed by the dismissal of an ordinary civil suit brought in the Spanish courts for the enforcement of civil rights by the legitimate representatives of a moral

¹ The argument for the petitioners in this court is omitted. — ED.

entity, constituting a French juridical person, to wit a bankruptcy of a commercial establishment formed and domiciled in Paris by the laws of that nation; and by the denial to these representatives who were syndics in bankruptcy, the right of being heard before the native courts in order to nullify acts and contracts done in Spain by the bankrupts. It could not be supposed that in passing on such a claim an *exequatur* was necessary, nor in any way could a question of extraterritoriality arise which could threaten or diminish the sovereignty and independence of Spain. Although the decree of the Tribunal of Commerce of the Seine, declaring the bankruptcy and naming the syndics, was invoked by the petitioners, it was not asked that these decrees should be executed in Spain; it was averred only as an existing fact which proved first the quality of the petitioners, and second the personal incapacity with which the defendants, the bankrupts Artola, were affected in their juridical relations in Spain. Though it was true the petitioners claimed a declaration by the Spanish courts not only that the defendants' acts were void, but also that they themselves were entitled to the property conveyed away by the brothers Artola, this did not involve the execution of the decree of a foreign court, but the enforcement of a pre-existing right of the creditors against the bankrupts; creditors who in default of capacity of the firm Artola Brothers, affected with the juridical status of bankruptcy by the decree of the French courts, were represented by the petitioners, the syndics.

Second: The decision denied the jurisdiction of the Spanish courts to recognize the juridical capacity of a partnership formed in France, a capacity proved by the laws and judicial decisions of that nation, and therefrom to determine the efficacy of the acts done by the partners in Spain with relation to the partnership property there; a denial based on the aforesaid erroneous supposition that the subject-matter of the litigation was beyond the jurisdiction of the Spanish courts, whereas, it being a question of the declaration or the denial of civil rights over property situated and acts done in Spain, it was for the courts of the country exclusively to entertain and determine the litigation without the necessity of previous proceedings to obtain an *exequatur*. This decision infringes the legal doctrine, established by the jurisprudence of this Supreme Court in its decisions of January 13 and May 12, 1885, and May 26, 1887, that his own status and capacity accompany a foreigner, and that the laws of his country should be applied in order to avoid the inconveniences of not judging him by a single law, and consequently that there is no need of obtaining an *exequatur* for judicial declarations of status. This doctrine is even stronger because it lies at the foundation of the provisions of Article 9 of the Civil Code and Article 15 of the Code of Commerce, also infringed by the judgment appealed from; the first of which provides that Spaniards are bound, even when residing abroad, by the laws relating to status, condition, and legal capacity; and the second ordains that foreigners and associations formed in foreign countries may carry on commerce in

Spain, subject to the laws of their own country with regard to their capacity to contract.

GULLÓN, J. Article 2 of the Treaty with France of January 7, 1862, and Article 32 of the Royal Decree of November 17, 1852, cited in the first reason for appeal, are inapplicable, and could not be infringed, for the judgment did not pass upon the capacity of the petitioners, nor deny their quality as syndics of the commercial partnership Artola Brothers, nor did it deny the free access which Frenchmen are entitled to have to the Spanish courts; it was limited to declaring, for the reasons expressed in it, the incompetence of the court of La Vecilla because of the necessity, created by the nature of the claim, of previously obtaining the authorization of this Supreme Court. Neither is the second reason for appeal to be considered, though the principle laid down is clear; it is not applicable to the present case, because the prayer of the petition implies, as the judgment clearly points out, the recognition and execution in our country of the declaration of bankruptcy of the firm Artola Brothers, by decree of the Tribunal of Commerce of the Seine. This decree requires, in order to be carried out in Spain, the grant of an *exequatur* by this court.

We adjudge that we ought to decree and we do decree that there is no cause for the appeal of D. Andrés Julio Chale and D. Alejo Dronín, as syndics of the bankruptcy of the firm Artola Brothers; we condemn them to lose the security deposited, which will be distributed according to law, and to pay costs, and transmit to the court of Valladolid a rescript to this effect.

SECTION IV.

ESTATES IN THE HANDS OF RECEIVERS.

ANON. v. LYNDSSEY.

CHANCERY. 1808.

[Reported 15 Vesey junior, 91.]

A MOTION was made for the appointment of a receiver upon an estate in the East Indies.

The LORD CHANCELLOR [LORD ELDON], granting the motion, said, the rents should be remitted to some person in England, who may pay them into the bank.

Sir Samuel Romilly, in support of the motion, suggested that as a receiver in India would be out of the jurisdiction, some person in this country should be the receiver, who might appoint his own agent in India.

The LORD CHANCELLOR approved that course, and said, there must

be some provision to prevent the necessity of applying to the court from time to time for permission to let.

A reference was accordingly directed to the Master to inquire what should be the term beyond which the receiver should not be permitted to let.¹

LANGFORD v. LANGFORD.

ROLLS COURT, CHANCERY. 1835.

[*Reported 5 Law Journal, New Series, Chancery, 60.*]

LORD LANGFORD, the defendant in this cause, had executed a settlement by which he charged his Irish estates in favor of the plaintiff, Lady Langford, with the payment of an annuity during her life. The annuity fell into arrear, and the defendant being in England, Lady Langford instituted this suit for an account and a receiver. The defendant resisted a motion for a receiver, on the ground that there were incumbrances prior to the annuity; but in July, 1835, the Master of the Rolls ordered a receiver, who was appointed in October. The order appointing the receiver was duly served on the tenants, with a notice to pay the rents to such receiver, and which they were willing to do. Mr. Murphy, the agent of the defendant, however, served notices on the tenants, to the effect "that the order recently served upon them, as made by the English Court of Chancery, was of no force or effect in Ireland, and that, notwithstanding the service of the said order, his Lordship would require, and if necessary enforce, payment of his rents as heretofore." The defendant, Lord Langford, by his affidavit stated that he had given no authority whatever to his agents in Ireland to demand payment of the rents of the said estate, or to distrain upon the tenants of the said estate; but he admitted that he had instructed his solicitor in Ireland, after giving him notice of the said order made by this court, to oppose, as far as the law would permit, the receivers of such rents and profits from receiving the same. The result of these proceedings was, that the English receiver was unable to obtain payment of any of the rents.²

Mr. Pemberton and *Mr. Bethel* now moved on behalf of the plaintiff, that a commission of sequestration might issue, to sequester the personal estate and the rents and property of the real estate of the defendant, Lord Langford, for the contempt.

Mr. Bickersteth, contra.

¹ A receiver was appointed to take charge of an estate abroad, in the following cases: *Davis v. Barrett*, 13 L. J. N. S. Ch. 304 (real estate in West Indies); *Hinton v. Galli*, 24 L. J. Ch. 121 (real and personal estate in Italy: unopposed). *Contra*, *Kittel v. Augusta*, T. & G. R. R., 78 Fed. 855; *Harvey v. Varney*, 104 Mass. 436. — Ed.

² The statement of facts is slightly condensed. — Ed.

PEPYS, M. R. That this is a contempt I have no doubt. It is true that this court has not the means of sending its officers to carry into effect its orders in Ireland; but it has jurisdiction over all persons in this country, and can compel obedience to its orders. The defendant sends to his solicitors in Ireland to oppose by all lawful means the receiver appointed by this court from receiving the rents. If he meant, by all lawful means in this country, there should be no resistance at all; because a party is not justified in opposing the order of the court; but he says, by all lawful means in Ireland—that is to say, because this court cannot send its process into Ireland, therefore Lord Langford's agent is to use all means in Ireland to oppose the order of the court here. His Honor said he hoped that Lord Langford would see his error, and know that he could not resist the order of this court; and that the order for a sequestration must therefore be made, unless his Lordship ceased to interfere with the officer of the court.

A motion was made on the part of the defendant, before the Lords Commissioners SHADWELL and BOSANQUET, to discharge the order of the Master of the Rolls; when the same was refused, with costs.¹

SHIELDS v. COLEMAN.

SUPREME COURT OF THE UNITED STATES. 1895.

[*Reported 157 United States, 168.*]

THE facts in this case are as follows: On June 6, 1892, in a suit in the Circuit Court of the United States for the Eastern District of Tennessee, brought by John Coleman against the Morristown and Cumberland Gap Railroad Company and Allison, Shafer & Company, an order was entered appointing Frank J. Hoyle receiver of all the property of the railroad company. The bill upon which this order was made alleged that in 1890 the defendant railroad company had contracted with its co-defendants, Allison, Shafer & Company, for the construction of its line of railroad from Morristown to Corryton, a distance of about forty miles, which work was partially completed in February or March, 1892; that there was yet due from the railroad company to Allison, Shafer & Company, more than \$50,000; that Allison, Shafer & Company were indebted to the complainant for work and labor done in the construction of such railroad; that notice, claiming a lien, had been duly given the railroad company, and that it was insolvent, as were also Allison, Shafer & Company. The prayer was for judgment against Allison, Shafer & Company, that the amount thereof be declared a lien upon the railroad property, and for the appointment of a receiver pending the suit.

¹ *Acc. Sercomb v. Catlin, 128 Ill. 556. — Ed.*

In pursuance of this order the receiver took possession of the railroad. On June 8, 1892, the railroad company appeared and filed a petition for leave to execute a bond for whatever sum might be decreed in favor of the complainant and that the order appointing the receiver be vacated. This petition was sustained, the bond given and approved, and an order entered discharging the receiver. Thereupon the receiver turned the property over to the railroad company, receiving the receipt of its general manager therefor.

On June 20, 1892, T. H. McKoy, Jr., filed his petition in the same case, setting up a claim against the railroad company for services rendered as an employé and vice-president of the railroad company, and for expenses incurred on its behalf. On July 4 and July 7, 1892, other petitions were filed setting up further claims against the railroad company.

On July 27, 1892, each of the defendants filed a separate answer to the complainant's bill. No further order was made by the Circuit Court until November 12, 1892, when, as the record shows, a demurrer of the railroad company to the petitions filed on July 4 and July 7 was argued and overruled, and leave given to answer on or before December rules.

Upon complainant's motion for the restoration of the receivership, W. S. Whitney was appointed temporary receiver of the railroad and its property, and was ordered to take custody and control of the property of the railroad company. On November 29, 1892 an amended and supplemental bill was filed, which stated facts sufficient to justify the appointment of a receiver.

On October 28, 1892, a bill was prepared addressed "to the Honorable John P. Smith, chancellor, etc., presiding in the chancery court at Morristown, Tennessee." This bill was in the name of sundry creditors of the railroad company against it, and other parties, setting forth certain judgments in favor of the complainants against the railroad company; its insolvency as well as that of the firm of Allison, Shafer & Company; the existence of a multitude of unpaid claims, and prayed the appointment of a receiver. This bill having been presented to the Honorable Joseph W. Sneed, one of the judges of the State of Tennessee, he issued, on the same day, an order appointing James T. Shields, Jr., temporary receiver, and directed him to take possession of all the property of the company, and to operate the railroad.

This fiat was on the same day filed in the office of the clerk of the chancery court, and the receiver therein named immediately took possession of the railroad property and commenced the operation of the road. His possession continued until November 14, 1892, when the receiver appointed by the Circuit Court of the United States took the property out of his hands.

On January 7, 1893, the Tennessee court continued Shields as permanent receiver, and ordered him to intervene in the present suit.

On January 24, 1893, the receiver J. T. Shields, Jr., in obedience

to the direction of the chancellor, filed his motion in the Circuit Court of the United States, setting forth the facts herein stated, and praying that court to vacate its order appointing W. S. Whitney receiver of the road, and for an order restoring the possession to him. This motion was on January 30, 1893, overruled, and exception duly taken. Subsequent proceedings were had in the Circuit Court culminating on January 31, 1894, in a final decree, which decree established certain liens, and ordered the property to be sold.

Thereafter an appeal to this court was prayed for and allowed in behalf of the receiver appointed by the State court.¹

BREWER, J. The single question presented by this appeal is that of the jurisdiction of the federal court to appoint a receiver, and take the railroad property out of the possession of the receiver appointed by the State court. . . .

Had the Circuit Court of the United States, when this property was in the possession of the receiver appointed by the State court, the power to appoint another receiver and take the property out of the former's hands? We are of opinion that it had not. For the purposes of this case it is unnecessary to decide whether, as between courts of concurrent jurisdiction, when proceedings are commenced in the one court with the view of the appointment of a receiver, they may be continued to the completion of actual possession, and whether, while those proceedings are pending in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of procedure, seize the property, and thus prevent the court in which the proceedings were first commenced from asserting its right to the possession. *Gaylord v. Fort Wayne, &c. Railroad*, 6 Biss. 286-291, cited in *Moran v. Sturges*, 154 U. S. 256-270; *High on Receivers*, 3d ed. § 50. Of course, the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express object, is the appointment of a receiver, and where possession by such officer is necessary for the full accomplishment of the other purposes named therein. The mere fact that, in the progress of an attachment or other like action, an exigency may arise, which calls for the appointment of a receiver, does not make the jurisdiction of the court, in that respect, relate back to the commencement of the action.

In *Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 301, a question was presented as to the time that jurisdiction attaches. Mr. Justice Matthews, after quoting from *Cooper v. Reynolds*, 10 Wall. 308, and *Boswell's Lessee v. Otis*, 9 How. 336, observed: "But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceedings was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some

¹ The statement of facts has been abridged. Part of the opinion, discussing a question of practice, and other parts dealing with the facts, are omitted. — ED.

assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may, by law, be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

Undoubtedly the Circuit Court had authority under the bill filed June 6, 1892, to make the order appointing the receiver and taking possession of the property. Even if it were conceded that the bill was imperfect and that amendments were necessary to make it a bill complete in all respects, it would not follow that the court was without jurisdiction. The purpose of the bill — the relief sought — was, among other things, the possession of the property by a receiver to be appointed by the court, and when the court adjudged the bill sufficient, and made the appointment, that appointment could not be questioned by another court, or the possession of the receiver thus appointed disturbed. The bill was clearly sufficient to uphold the action then taken.

While the validity of the appointment made by the Circuit Court on June 6, 1892, cannot be doubted, yet, when that court thereafter accepted a bond in lieu of the property, discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching that property.

It is true that the Circuit Court had the power to thereafter set aside its order accepting security in place of the property and enter a new order for taking possession by a receiver, yet such new order would not relate back to the original filing of the bill so as to invalidate action taken by other courts in the meantime. Accepting a bond and directing the receiver to return the property to the owner was not simply the transfer of the possession from one officer of the court to another. The bond which was given was not a bond to return the property if the judgment to be rendered against the contractors was not paid, but a bond to pay whatever judgment should be rendered. It was, therefore, in no sense of the term a forthcoming bond. The property ceased to be *in custodia legis*. It was subject to any rightful disposition by the owner or to seizure under process of any court of competent jurisdiction.

The intervening petitions filed on June 20, July 4, and July 7 are not copied in the record, having been omitted therefrom by direction of the Circuit Court. Evidently, therefore, there was nothing in them which bears upon the question before us, and doubtless they were simply intervening petitions, claiming so much money of the railroad company and containing no reference to the appointment of a receiver.

But it is said that the receiver has no such interest in the property as will give him a standing in the Circuit Court to petition for the restoration of the property to his possession, or to maintain an appeal to this court from an order refusing to restore such possession. This is a mistake. He was the officer in possession by appointment of the State court, the proper one to maintain possession and to take all proper steps under the direction of the court to obtain the restoration of the possession wrongfully taken from him. It is a matter of every-day occurrence for a receiver to take legal proceedings, under the direction of the court appointing him, to acquire possession of property or for the collection of debts due to the estate of which he is receiver. . . .

*The case, therefore, must be remanded to the Circuit Court for further proceedings not inconsistent with this opinion.*¹

HURD v. CITY OF ELIZABETH.

SUPREME COURT OF JUDICATURE, NEW JERSEY. 1879.

[*Reported 41 New Jersey Law, 1.*]

THE plaintiff brought this suit in his character of receiver of the Third Avenue Savings Bank. The allegations touching his right to sue were the following: "For that the said S. H. Hurd heretofore, to wit, on the thirtieth day of November, eighteen hundred and seventy-five, at the city of Kingston, in the State of New York, to wit, at Elizabeth, in said county of Union, was duly appointed receiver of the Third Avenue Savings Bank, by the Supreme Court of the State of New York, in pursuance of the laws of said State of New York, and afterwards, to wit, on the day and year last aforesaid, duly qualified as such receiver, and thereupon became empowered to exercise and perform all the powers and duties imposed upon him as receiver as aforesaid, by virtue of the laws of the State of New York and said appointment, and particularly by said laws and his said appointment, became seized and possessed of the personal property and choses in action of the said the Third Avenue Savings Bank, and entitled to sue for, collect, and receive all moneys then due to the said the Third Avenue Savings Bank, and particularly the several sums hereinafter mentioned."

The declaration then showed, in the form of common counts, sundry moneys due, antecedently to the receivership, to the savings bank, and concluded in the usual style. The defendant demurred.

BEASLEY, C. J. The plaintiff's right to stand as the actor in this suit is derived wholly from the receivership that was conferred

¹ See *In re Schuyler's Steam Tow Boat Co.*, 136 N. Y. 169, 32 N. E. 623. — ED.

upon him by the Supreme Court of the State of New York; and on the part of the defendant, such right is contested on the ground that it is contrary to established rules for the courts here to lend their assistance in carrying into effect an office created in the course of a proceeding before a foreign tribunal. To countenance this contention various authorities are cited, and notably among them that of *Booth v. Clark*, 17 How. 322. But that case belongs to a train of decisions which have been undoubtedly rightly decided, but which are not to be regarded as ruling the precise point now in issue. The decisions thus referred to will be found in *High on Receivers*, § 239, and they are all cases involving a controversy between the receiver and the creditors of the person whose property has been placed under the control of such receiver. In such a posture of things it is manifest that different considerations should have force from those that are to control when the litigation does not involve the rights of creditors in opposition to the claims of the receiver. That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this State the assets of the debtor, is a proposition that appears to be asserted by all the decisions; but that, similarly, he should not be permitted to remove such assets when creditors are not so interested, is quite a different affair, and it may, perhaps, be safely said that this latter doctrine has no direct authority in its favor. There are certainly dicta that go even to that extent, so that text-writers seem to have felt themselves warranted in declaring that the powers of an officer of this kind are strictly circumscribed by the jurisdictional limits of the tribunal from which he derives his existence, and that he will not be recognized as a suitor outside of such limits. But I think the more correct definition of the legal rule would be that a receiver cannot sue, or otherwise exercise his functions, in a foreign jurisdiction whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction. There seems to be no reason why this should not be the accepted principle. When there are no persons interested but the litigants in a foreign jurisdiction, and it becomes expedient, in the progress of such suit, that the property of one of them, wherever it may be situated, should be brought in and subjected to such proceeding, I can think of no objection against allowing such a power to be exercised. It could not be exercised in a foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied. But beyond this precaution, why should any restraint be put upon the foreign procedure? The question thus raised has nothing to do with that other inquiry that is frequently discussed in the books, whether a receiver at common law is in point of fact clothed with the power to sue in a foreign jurisdiction; that is a subject standing by itself, for the present argument relates to a case in which the officer is

authorized, so far as such power can be given by the tribunal appointing him, to gather in the assets, both at home and abroad. Conceding that the officer is invested with this fulness of authority, it would appear to be in harmony with those legal principles by which the intercourse of foreign States is regulated for every government, when its tribunals are appealed to, to render every assistance in its power in furtherance of the execution of such authority, except in those cases when, by so doing, its own policy would be displaced or the rights of its own citizens invaded or impaired. After completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided. The appointment of a receiver, with full powers to collect the property of a litigant, wherever the same might be found, should be deemed to operate as an assignment of such property to be enforced everywhere, subject to the exception just defined. Such a rule is, I think, both practicable and just. If A., being the only creditor of B., should sue him in a court of this State, and the exigencies of justice should require that the property of B., wherever the same might be situated, should be put under the control of the forum in which the proceedings were pending, and such receiver should be appointed and should be legally clothed with the requisite authority to sue for, and take possession of such property, I can find nothing in the rules of law or of good policy that should permit the debtors of B. to set up that such judgment has no extraterritorial force. To sanction such a plea would be to frustrate, as far as possible, the foreign procedure, simply for the purpose of doing so, the single result being that a court would be baffled, and perhaps prevented from doing justice. Such ought not to be the legal attitude of governments towards each other. To the extent to which this subject has been involved, it has, I think, been properly disposed of in the adjudications already made in this State. Thus in *Varnum v. Camp*, 1 Green, 326, it was decided that an instrument efficient at the domicile of the maker to transfer his property could not dispose, in a manner inconsistent with the policy of our laws, of his movables situate here. In this case the duty of comity was admitted, but the decision was put upon the ground that this State was not required, by force of such duty, to abandon an established policy of its own in favor of a different policy prevalent in another jurisdiction. *Moore v. Bonnell*, 2 Vroom, 90, was decided on a similar principle, and it has this additional feature, that while it in a general way rejects the control of the foreign policy, it does this only to the extent rendered necessary for the purpose of self-protection, for, beyond this limit, it gives effect to and enforces the foreign law. And the same disposition to co-operate, as far as practicable, in sustaining an alien policy is exhibited in the case of *Normand's Administrator v. Grognaud*, 2 C. E. Green, 425. The foregoing view will be found to be in accord with the following cases: *Hoyt v. Thompson*, 1 Seld. 320; *Runk v.*

St. John, 29 Barb. 585; Taylor v. Columbian Insurance Co., 14 Allen, 353.

In view of these considerations and authorities my conclusion is, that the legal effect of the appointment of a receiver in a foreign jurisdiction in transferring to him the right to collect the property passing under his control by virtue of such office, will be so far recognized by the courts of this State as to enable such officer to sustain a suit for the recovery of such property.

But it is also said that the declaration is substantially defective. It is certainly informal and so imperfect that upon motion it would have been set aside; and the only question is, whether, by force of our statute, it may not be supported as against a general demurrer. The defects of this pleading are very marked. For example: the appointment of a receiver is a measure incidental to a suit, and yet the pendency of such a suit is not shown, the curt averment being that the plaintiff, at a certain date, was appointed to such office by the Supreme Court of the State of New York. So the capacities of the receiver and his right to sue is in the form rather of a deduction of the pleader than the statement of a fact. I can find nothing analogous to such a course in any of the precedents of pleading. Still, as the imperfections of this declaration could readily have been objected to on motion, which has taken the place of a special demurrer, and as it is not entirely clear whether such imperfections are matters of substance or matters of form, I have concluded that the demurrer ought not to be sustained.¹

¹ Following an early decision of the Supreme Court of the United States, it has sometimes been broadly stated that a foreign receiver can under no circumstances sue. Booth v. Clark, 17 How. 322; Brigham v. Luddington, 12 Blatch. 237; Farmer's & M. Ins. Co. v. Needles, 52 Mo. 17; Moreau v. Du Bellet (Tex. Civ. App.) 27 S. W. 503; Sparks v. Estabrooks, 72 Vt. 101, 47 Atl. 394; Filkins v. Nunnemacher, 81 Wis. 91, 51 N. W. 79. It is generally held, however, that if no domestic creditor is prejudiced thereby a foreign receiver as such will be given a standing in court. Rogers v. Riley, 80 Fed. 759; Kirtley v. Holmes, 107 Fed. 1; Boulware v. Davis, 90 Ala. 207, 8 So. 84; Patterson v. Lynde, 112 Ill. 196; Higbee v. Peed, 98 Ind. 420; Metzner v. Bauer, 98 Ind. 427; Wyman v. Eaton, 107 Ia. 214, 77 N. W. 865 (*semble*); McAlpin v. Jones, 10 La. Ann. 552; Castleman v. Templeman, 87 Md. 546, 40 Atl. 275; Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888; Comstock v. Frederickson, 51 Minn. 350, 53 N. W. 713; Glaser v. Priest, 29 Mo. App. 1; Bidlack v. Mason, 26 N. J. Eq. 230; Sobernheimer v. Wheeler, 45 N. J. Eq. 614; Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489; Runk v. St. John, 29 Barb. 585; Merchants' Nat. Bank v. McLeod, 38 Oh. S. 174; Lycoming Ins. Co. v. Wright, 55 Vt. 526. So a foreign receiver may prove in Bankruptcy. *Ex parte* Norwood, 3 Biss. 504. The assignee of a foreign receiver may sue, in a State where the assignee of a chose in action sues in his own name. Hoyt v. Thompson, 5 N. Y. 320. In Falk v. Janes, 49 N. J. Eq. 484, a foreign receiver appointed at the suit of a New Jersey creditor, who alone was interested, was allowed to sue even against the interest of another domestic creditor.

If proceedings have been begun by creditors to reach the property, either by attachment or by bill in equity, before the appointment of the receiver, the receiver cannot obtain the property, either as against domestic creditors (Day v. Postal Tel. Co., 66 Md. 354; Hunt v. Columbian Ins. Co., 55 Me. 290), or as against creditors

WARD v. CONNECTICUT PIPE MANUFACTURING CO.

SUPREME COURT OF ERRORS, CONNECTICUT. 1899.

[*Reported 71 Connecticut, 345.*]

APPLICATION by a receiver for instructions in regard to the allowance and payment of certain claims presented against the defendant corporation, brought to the Superior Court in New Haven County and reserved by that court, RORABACK, J., upon an agreed statement of facts, for the consideration and advice of this court.

The Davies & Thomas Company, a Pennsylvania corporation, was a creditor of the defendant, a Connecticut corporation, which was then engaged in construction work in Brooklyn, New York, under a contract with the Kings County Electric Light Company. For the purposes of this work the defendant had an office in Brooklyn, and a considerable quantity of pipes, tools, and material there. Part of the property was attached by the Davies & Thomas Company on December 28, 1897, in a suit against the defendant in the Supreme Court of New York. No service of process was made on the defendant until January 24, 1898, when service was made in Connecticut on its president, an inhabitant of this State, by order of the New York court. Meanwhile, on December 29, 1897, the defendant had been put in the hands of a receiver, in a suit for its dissolution, instituted on that day, by the plaintiffs, who owned three quarters of its capital stock. The decree appointing the receiver, directed him to take immediate possession of all the property of the defendant, and ordered it "and its officers and all persons having in their possession or control any of the property, books, or papers of said company," to surrender them to him, and the defendant "to make any and all conveyances and assurances to said receiver which may be necessary and proper to facilitate and assure the due execution of this order."

Later on the same day the defendant, by vote of its directors, assigned in writing to the receiver, as such, all its property in Brooklyn, and all its choses in action.

The Brooklyn office of the defendant was abandoned on December 31, 1897, and by that time all work under the contract was ended.

On February 24, 1898, a further attachment was made upon the original warrant in the suit of the Davies & Thomas Company on other

from any other State not subject to the jurisdiction of the court which appointed the receiver. *Lichtenstein v. Gillett*, 37 La. Ann. 522; *Bartlett v. Wilber*, 53 Md. 485; *Warren v. Union Nat. Bank*, 7 Phila. 156; *Mosely v. Burrow*, 52 Tex. 404. *Contra*, *Long v. Girdwood*, 150 Pa. 413, 24 Atl. 711.

Even if the attachment by a creditor was made after the appointment of the receiver, the same rule is followed, both as to domestic creditors (*Taylor v. Columbian Ins. Co.*, 14 All. 353; *Willetts v. Waite*, 25 N. Y. 577), and as to foreign creditors. *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 24 N. E. 250; *Linville v. Hadden*, 88 Md. 594, 41 Atl. 1097. — ED.

property of the defendant in Brooklyn. When the service was made on the president, the Davies & Thomas Company knew of the appointment of the receiver.

On April 1, 1898, the Davies & Thomas Company, having taken judgment by default, took out execution, and had it levied on the property attached. It sold for less than its fair market value and the Davies & Thomas Company bought most of it. Others were present at the sheriff's sale and made lower bids. The receiver knew of the sale and suggested to one party that he should go and bid.

The receiver was informed by third parties that all the defendant's property in Brooklyn had been taken by the attachment of December 28, 1897, and hence did not take possession of any of it. In fact part had not been attached, but was subsequently attached in February, as above stated.

After their purchase at the sheriff's sale, the Davies & Thomas Company sold part of the property so bought to third parties for a sum exceeding what it had paid for the whole.

In May, 1898, the Davies & Thomas Company filed with the receiver a claim against the defendant company for the amount of the New York judgment, a copy of which was annexed, less the net proceeds of the execution sale; also an alternative claim for the original indebtedness upon which said judgment was founded, less said proceeds of sale. The claim also set forth that it had attached in said New York suit a certain indebtedness to the defendant under said construction contract from certain parties made garnishees, and put a lien on the work done under the contract for certain materials supplied by it therefor to the defendant; and asked that the cash value of said lien and foreign attachment might be determined according to law.

The receiver having refused to allow the claim, and reported the matter to the court, the following questions were stated for its determination:—

Claims of the Davies & Thomas Company.

“ 1. That they are entitled to prove their claim against the estate in the hands of the receiver in Connecticut; (2) that they are entitled to prove said claim for the full amount of the judgment, and not simply for the amount of the debt upon which said judgment was founded; (3) that if any deduction from the amount of the claim is to be made because of their security by attachment and execution, as hereinbefore stated, it should be as follows: (a) The cash value of the security held by attachment levied before the receivership should be credited upon the amount of said claim; (b) the cash value of the security held by attachment levied after the receivership should be credited upon said claim; (4) that the price for which the property was sold out by the sheriff, after deducting said fees and expenses as hereinbefore stated, determines the cash value, and that that valuation is conclusive.”

Claims of the Receiver.

"1. That said Davies & Thomas Company are not entitled to prove their claim at all, but that having elected to retain their attachment and proceed against the property in Brooklyn, they are confined to that; (2) that if they can prove it at all, they can prove only the amount of debt upon which said judgment was founded; (3) that the auction sale of the property is not conclusive evidence as to the value of the property; that for the purpose of proof the property attached should be taken at its fair market value at the time of the appointment of the receiver; (4) that if said Davies & Thomas Company are allowed to prove their claim at all, they should be allowed only such a dividend from the estate as added to the value of the property held by them under attachment would equal the amount which they would have received from the estate had they released their attachments and allowed the property to go into the possession of the receiver as a part of the estate; that is, that they should receive such a dividend as, added to the value of the property held by them under their attachment, would be in the same proportion to their claim as the whole estate, including said property so attached by them, would bear to the whole amount of the claims proved against the estate."¹

BALDWIN, J. The judgment recovered by default in the Supreme Court of the State of New York cannot found a claim against the estate in the hands of the receiver. The only service of process upon the defendant having been made out of that State, there exists no personal obligation on its part to pay it.

The right of the Davies & Thomas Company, however, to present its original account against the defendant for allowance in the receivership proceedings in this State, was not prejudiced by its having put it into judgment in New York. That was necessary to secure the benefit of the attachment which had been lawfully made before those proceedings were commenced. *Lawrence v. Batcheller*, 131 Mass. 504. Our statute dissolving attachments made within sixty days before the appointment of a receiver of a corporation (Public Acts of 1895, p. 491), has no application to legal proceedings in other States.

There is no ground for the claim that the Davies & Thomas Company, after receiving notice of the appointment of the receiver in Connecticut, was put to an election whether to pursue its remedy in the New York courts or in those of this State. Whatever might be true, had it been a citizen of Connecticut, it had a right, as a citizen of Pennsylvania, to avail itself of the security which it had already obtained by attachment, as fully as if it had come by a mortgage, and should it prove insufficient to satisfy its demand, to maintain a claim for the balance in the same manner as any other creditor.

The property thus attached naturally brought less than its fair

¹ Arguments of counsel are omitted. — ED.

market value at the sale on execution. Being, however, in the custody of the New York court, and a forced sale being the only legal mode of disposing of it to satisfy the judgment, the net proceeds were all for which the execution creditor was accountable in reduction of its demand.

Different considerations apply to the second attachment, and govern its consequences. It was made after the appointment of the receiver, and with notice of that fact. The decree under which he derived his title required the defendant to execute conveyances of any of its property which might be necessary and proper by way of further assurance. It did execute forthwith a conveyance to him of all its property in New York. The Davies & Thomas Company had notice of the decree, and therefore equitable notice that such a conveyance might have been made, a month before it made its second attachment.

An assignment of personal property, not followed by a change of possession, is voidable by attaching creditors, unless the assignee can give a satisfactory excuse for the want of delivery. *Swift v. Thompson*, 9 Conn. 63. The defect of title is due to a presumption of fraud derived from the consent of the assignee to a continuance of the appearance of ownership in the assignor. An assignment by an insolvent debtor for the benefit of his creditors generally is not within the reason of the rule. He cannot be presumed to intend to defraud any of them by a conveyance made in the interest of all. Nor is it certain that everything that is assigned will be accepted. The representative of the creditors is entitled to a reasonable time within which to decide whether any particular item of the property is worth taking or not.

The suit now before us is one brought by a majority of the defendant's stockholders for its dissolution, and counts upon a vote of the directors that its affairs ought to be wound up and a receiver appointed. The receiver's failure to take possession of the goods upon which the second attachment was levied, is sufficiently explained by the information which he received that they had been seized under the first attachment before his appointment. Under these circumstances, the transfer of title to him was good under our law, as against any creditors of the defendant. It is unnecessary to determine whether the receiver, never having been in possession, could have set it up before the courts of New York to defeat the attachment. He did not intervene for that purpose in the proceedings there, nor, had he done so unsuccessfully, would it have precluded him from insisting that in this suit the Davies & Thomas Company appears in the character of a wrong-doer, asking equity where it has not done equity. *Hibernia National Bank v. Lacombe*, 84 N. Y. 367, 386. General Statutes, § 532, directs courts of probate, in the settlement of estates of insolvent debtors, after providing for preferred claims, to order all other claims allowed by the commissioners to be paid *pro rata*, "subject to such existing equities as may be ascertained and decreed by the court, upon hearing, after

public notice." A similar rule must govern in these proceedings. General Statutes, §§ 1942, 1965; Public Acts of 1895, p. 573, § 3; *In re Waddell-Entz Co.*, 67 Conn. 324. The Davies & Thomas Company not only knew of the decree appointing the receiver, but knew, or had ample means of knowing, when the second attachment was made, that the property had been transferred to the receiver by a good conveyance at common law, executed in furtherance of that decree. It is not alleged, and cannot be presumed that, under the laws of New York, such a transfer is invalid. *Guillander v. Howell*, 35 N. Y. 657; *Hoyt v. Thompson*, 19 N. Y. 207, 224. A voluntary conveyance of goods made by the owner at his domicile, in a form which is sufficient there and also at common law, is effectual to transfer the title, although they may at the time be in another State, unless the statutes or local policy of that State forbid. The present was from the beginning substantially a voluntary proceeding. Its declared purpose was to carry out a vote of the directors of the defendant company providing for winding it up through the agency of a receiver. Service of the writ was accepted by the defendant, with a stipulation for its immediate return, and for a hearing on the day of its issue, upon the application for a temporary receiver. The statute authorizes the Superior Court, as a court of equity, to wind up the affairs of any such corporation and dissolve it, on the complaint of shareholders owing not less than a tenth of its capital stock, if it be found that the interests of the shareholders will thus be best protected. Public Acts of 1895, p. 571, § 1. The appointment of the plaintiff was based upon such a finding. No element of compulsion is disclosed by these proceedings. If the assignment by the defendant to the receiver had been forced upon it at the instance of a creditor, this might have been regarded as an *in invitum* proceeding. *Catlin v. Wilcox Silver-Plate Co.*, 123 Ind. 477, 24 Northeastern Rep. 250. As it is, that question is not involved, for the conveyance made to protect its interests, and under a decree which three-quarters of its shareholders had sought and none opposed, cannot fairly be regarded as other than a voluntary one. It was an exercise of the *jus disponendi* which is incident to ownership. It placed the goods which were its subject precisely where the defendant wished to have them placed, at the disposal of one representing primarily all its creditors and secondarily all its shareholders. This wish had been first expressed by the vote to wind up; then by the consent to an immediate hearing on a petition by three quarters of the shareholders for the appointment of a receiver to aid in carrying out the vote; then by making no opposition to such an appointment, by what was virtually a consent decree; and finally by transferring to him whatever title it could to all that it possessed.

The effect of such a transfer on goods in another State is not to be determined simply by the rule of comity which is applicable to extra-territorial assignments by operation of law; but rests on the general principles of jurisprudence as to the right of every one to dispose of

what he owns. *Egbert v. Baker*, 58 Conn. 319; *First National Bank v. Walker*, 61 Conn. 154.

The Davies & Thomas Company has come into this State to secure, at the hands of a court of equity, the benefit of a winding-up suit, in the course of which it has acquired a special advantage by a seizure of assets of the estate in another jurisdiction, with actual notice of the pendency of the action, and equitable notice of the receiver's title under the conveyance which has been under consideration. No one can claim the benefit of such a proceeding without renouncing every right which is inconsistent with its proper object. That object is, primarily, to dispose of all the property which the defendant owned at the commencement of the suit, subject to existing liens and lawful preferences, for the equal benefit of all its creditors. This cannot be accomplished, if without leave of the court new liens can be created upon it or preferences secured, upon no new consideration, during the pendency of the action.

The benefit of the first attachment can be lawfully retained. That of the second must be renounced, and the property taken upon it considered, as between the receiver and the Davies & Thomas Company, as assets of the estate which it has wrongfully converted, and for which it must account, before it can be allowed to share as a creditor in the estate. The measure of liability is the fair value of the goods at the date of the attachment, with interest. *Oviatt v. Pond*, 29 Conn. 479. As it had no equitable right to levy on them, it is immaterial that they brought less than their value at the sheriff's sale.

If the Davies & Thomas Company pays the amount above stated to the receiver, it should be admitted to prove its claim upon its original account against the defendant, less the net proceeds of the goods sold under the first attachment. In ascertaining such proceeds, no deduction from the gross amount received from their sale should be made on account of fees or costs accruing under the second attachment. If it does not make such payment, its claim should be wholly disallowed. *In re Greeley & Co.*, 70 Conn. 494; *Cockerell v. Dickens*, 3 Moo. P. C. C. 98, 132.

The Superior Court is advised that the Davies & Thomas Company is not entitled to prove its claim against the estate in the hands of the receiver, unless it first pays him the amount specified in the foregoing opinion, and that, upon such payment, it can prove a claim, but only for the original indebtedness, less the net proceeds of the original attachment, ascertained as indicated in said opinion.

No costs will be taxed in this court in favor of any party.

In this opinion the other judges concurred.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY v.
KEOKUK NORTHERN LINE PACKET CO., CLUBB,
INTERPLEADER.

SUPREME COURT OF ILLINOIS. 1883.

[Reported 108 Illinois, 317.]

THIS was an attachment suit, brought by the Chicago, Milwaukee and St. Paul Railway Company, against the Keokuk Northern Line Packet Company, in the Circuit Court of Adams County, in this State. The writ of attachment was, on the 21st day of April, 1881, levied upon the barge "G. W. Duncan," lying at Quincy, in said county, as the property of the defendant. Samuel C. Clubb, under the provision of section 29 of our Attachment Act, "that any person other than the defendant claiming the property attached may interplead," etc., interpleaded in the case, claiming the property so attached, under an appointment as receiver of the property and effects of said packet company, by the Circuit Court of St. Louis, in the State of Missouri, in a certain cause in said court wherein said packet company was defendant. There was judgment in favor of the interpleader, Clubb, which, on appeal, was affirmed by the Appellate Court for the Third District, and the railway company appealed to this court.

The plaintiff in the attachment suit had first filed a replication to the pleas of the interpleader, traversing the same, but afterward, on its motion granted by the court, it withdrew the replication, as having been filed by mistake, and then moved the court to file its plea in abatement, which had been intended to be filed instead of the replication, denying the right to interplead as receiver under the appointment of a foreign court, which motion the court overruled, whereupon said plaintiff company filed the plea in abatement, which plea the court, on motion of said Clubb, ordered to be stricken from the files. The plaintiff company then refiled its said replication, upon which issue was joined and the trial had. The interpleader's first plea alleges the barge was his own property at the time of the attachment of it; the second, that it was his property as receiver; the third, that at such time it was in his possession as receiver.

The facts of the case shown by the evidence are, that at the October term, 1880, of the Circuit Court of the city of St. Louis, in the State of Missouri, Samuel C. Clubb was duly appointed receiver of the Keokuk Northern Line Packet Company, an insolvent corporation of that State, with power and authority to take possession of all the business and property of the corporation, and to manage the affairs thereof, under the orders of the court, the receiver giving bond in the sum of \$200,000 for the faithful discharge of his duties. At the time of such appointment the barge "G. W. Duncan," in question, was lying at the land-

ing at St. Louis, within the State of Missouri, and within the jurisdiction of said court. The receiver immediately took possession of the barge, and afterward, on the 6th day of November, 1880, he chartered the barge to the steamer "E. W. Cole," for a trip up the Mississippi River and return. The barge was taken, under the charter, up the river as far as Quincy, Illinois, where it was detained by the ice, and remained until the levy of the writ of attachment in this case upon it on the 21st day of April, 1881. At the request of the captain of the steamer "E. W. Cole," the receiver released him from the charter, and took possession of the barge at Quincy, and ever since, until the levy of the attachment, retained such possession, having a watchman over and guarding the barge against danger. The receiver made an effort to have the barge removed to St. Louis as soon as the river was clear of ice, having made a contract with a steamboat line for the purpose, but did not succeed in having the removal made before the attachment. The court which appointed the receiver, at its April term, 1881, made an order authorizing the receiver to intervene in the attachment suit, and take the necessary steps to secure possession of the barge.¹

SHELDON, C. J. We will consider the case as properly presenting by the pleadings the question of the right to interplead in the suit in the capacity of receiver.

The general doctrine that the powers of a receiver are coextensive only with the jurisdiction of the court making the appointment, and particularly that a foreign receiver should not be permitted, as against the claims of creditors resident in another State, to remove from such State the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied, we fully concede; and were this the case of property situate in this State, never having been within the jurisdiction of the court that appointed the receiver, and never having been in the possession of the receiver, it would be covered by the above principles, which would be decisive against the claim of the appellee. But the facts that the property at the time of the appointment of the receiver was within the jurisdiction of the court making the appointment, and was there taken into the actual possession of the receiver, and continued in his possession until it was attached, take the case, as we conceive, out of the range of the foregoing principles. We are of opinion that by the receiver's taking possession of the barge in question within the jurisdiction of the court that appointed him, he became vested with a special property in the barge, like that which a sheriff acquires by the seizure of goods in execution, and that he was entitled to protect this special property while it continued, by action, in like manner as if he had been the absolute owner. Having taken the property in his possession, he was responsible for it to the court that appointed him, and had given a bond in a large sum to cover his responsibility as receiver, and to meet such liability he might maintain

¹ Arguments of counsel are omitted. — ED.

any appropriate proceeding to regain possession of the barge which had been taken from him. *Boyle v. Townes*, 9 Leigh, 158; *Singerly v. Fox*, 75 Pa. 114. It is well settled that a sheriff does, by the seizure of goods in execution, acquire a special property in them, and that he may maintain trespass, trover, or replevin for them.

It is claimed that there was here an abandonment of the barge by leasing it and suffering it to be taken out of the State, — that the purpose in so doing was an unlawful one, and a gross violation of official duty. We do not so view it. The receiver was, by his appointment, authorized to manage the affairs of the corporation under the orders of the court. The business of the corporation was running boats on the Mississippi River, and chartering the barge for a trip up that river was but continuing the employ of the barge in the business of the corporation, and therefrom making an increase of the assets to be distributed among the creditors. *Brownell v. Manchester*, 1 Pick. 233, decides that a sheriff in the State of Massachusetts, who had attached property in that State, did not lose his special property by removing the attached property into the State of Rhode Island for a lawful purpose. *Dick v. Bailey et al.* 2 La. Ann. 974, holds otherwise in respect to property attached in Mississippi, and sent by the sheriff into Louisiana for an illegal purpose. It is laid down in *Drake on Attachment* (5th ed.), § 292, that the mere fact of removal by an officer of attached property beyond his bailiwick into a foreign jurisdiction, without regard to the circumstances attending it, will not dissolve the attachment; that if the purpose was lawful, and the possession continued, the attachment would not be dissolved; but if the purpose was unlawful, though the officer's possession remained, or if lawful and he lost his possession, his special property in the goods would be divested, — citing the two cases above named. We do not consider that there was any unlawful purpose here in the chartering and employing of the barge, as was done.

It is insisted the possession of the barge was lost. There was certainly evidence tending to show possession by the receiver up to the time of the attachment, and in support of the judgment of the Appellate Court we must presume that it found the existence of all the facts necessary to sustain the judgment, where there was evidence tending to show their existence, and that court's finding of fact is conclusive upon us. By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver, and it is the established rule that where a legal title to personal property has once passed and become vested in accordance with the law of the State where it is situated, the validity of such title will be recognized everywhere. *Caniwell v. Sewell*, 5 Hurl. & N. 728; *Clark v. Connecticut Peat Co.*, 35 Conn. 303; *Taylor v. Boardman*, 25 Vt. 581; *Crapo v. Kelly*, 16 Wall. 610; *Waters v. Barton*, 1 Cold. (Tenn.) 450.

Under this rule we hold that where a receiver has once obtained

rightful possession of personal property situated within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession, though he take it, in the performance of his duty, into a foreign jurisdiction; that while there it cannot be taken from his possession by creditors of the insolvent debtor who reside within that jurisdiction. Where a receiver of an insolvent manufacturing corporation, appointed by a court in New Jersey, took possession of its assets, and for the purpose of completing a bridge which it had contracted to build in Connecticut, purchased iron with the funds of the estate and sent it to that State, it was decided that the iron was not open to attachment in Connecticut by a creditor residing there. *Pond v. Cooke*, 45 Conn. 126. And where C. was appointed, by a court in Arkansas, receiver of property of T., a defendant in a suit, and ordered to ship it to Memphis, for sale, and to hold the proceeds subject to the order of the court, and did so ship it to Memphis, where it was attached by creditors of T., it was held that C. could maintain an action of replevin for the property in Tennessee. *Cagill v. Wooldridge*, 8 Baxter, 580. *Kilmer v. Hobart*, 58 How. Pr. 452, decides that receivers appointed in another State, and operating a railway as such, but having property in their hands as receivers in New York, cannot there be sued,—that an attachment issued in such suit will be vacated.

This is not the case of the officer of a foreign court seeking, as against the claims of creditors resident here, to remove from this State assets of the debtor situate here at the time of the officer's appointment, and ever since, and of which he had had no previous possession. It is to such a case as that, as we understand, that the authorities cited by appellant's counsel apply, and not to a case like the present, where the property was, at the time of the appointment of the foreign receiver, within the jurisdiction of the appointing court, and there taken into the receiver's possession, and subsequently suffered by him to be brought into this State in the performance of his duty, and his possession here wrongfully invaded, and he seeking but redress for such invasion.

The judgment of the Appellate Court must be affirmed.

*Judgment affirmed.*¹

¹ *Acc.* *Robertson v. Stead*, 135 Mo. 135, 36 S. W. 610; *Osgood v. Maguire*, 61 N. Y. 524; *Cagill v. Wooldridge*, 8 Baxt. 580; 16 Clunet, 725 (Denmark, 14 Feb. '87). *Contra*, *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892. Where a voluntary assignment is made by the debtor to the receiver, it will be treated like any case of voluntary assignment, and the receiver's rights recognized. *Graydon v. Church*, 7 Mich. 36; *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 64 N. W. 751.

A fortiori, when the right was never in the debtor, but accrued to the receiver, he may sue in any jurisdiction upon his individual right. Thus he may sue for property bought by him: *Pond v. Cooke*, 45 Conn. 126; upon a judgment obtained by him: *Wilkinson v. Culver*, 25 Fed. 639; to foreclose a mortgage made to him: *Inglehart v. Bierce*, 36 Ill. 133; and to enforce the terms of a contract, made with the corporation of which he is the receiver, but performed on his side by himself under an ar-

GILMAN v. KETCHAM.

SUPREME COURT OF WISCONSIN. 1893.

[Reported 84 *Wisconsin*, 60.]

THE case was that the plaintiff, in his representative capacity as administrator of the estate of Winthrop W. Gilman, deceased, on the 24th day of September, 1891, was a creditor of the Hudson River Boot & Shoe Manufacturing Company, a corporation created and existing under the general laws of the State of New York, in which State the plaintiff also resided, in the sum of \$947.87, and commenced an action in the Circuit Court of Milwaukee County, in which Hubbard & Baker, of West Superior, Wis., were garnished, as being indebted to the said corporation, September 26, 1891; and on the 14th of the following month they filed their answer, admitting an indebtedness to the defendant of \$545.41, and paid that sum into court. On the 8th of February, 1892, by stipulation between the plaintiff's attorneys and the attorneys for William M. Ketcham, the interpleading claimant, he was allowed to interplead in respect to his claim to said money. In Ketcham's answer he alleged that a creditor's bill had been filed in the Supreme Court of the State of New York, on the 28th of July, 1891, against the defendant corporation, for the purpose of effecting a voluntary dissolution of the corporation and the distribution of its effects; that on the 29th of July, 1891, the said supreme court ordered that the creditors of the said corporation, and each and every one of them, be, and they were thereby, restrained from bringing any action against the corporation for the recovery of any sum of money, and they were thereby enjoined from taking any further proceedings on any such actions theretofore commenced. That this order was served personally upon the plaintiff on the 5th of August, 1891, in New York; that on the 31st of October, 1891, pursuant to the order to show cause, and due notice thereof given to each of the creditors, stockholders, and persons interested in said corporation or its affairs, the court ordered and adjudged that the said corporation be, and it was thereby, dissolved, and that William M. Ketcham, the interpleading claimant, was appointed permanent receiver, and qualified as such; and by virtue of such proceedings he became vested with the right and title to all the property, effects, and credits of every description belonging to said corporation, and become entitled to receive the said sum of \$539.45, so admitted by said garnishees to be due, and theretofore paid into court; and that the plaintiff, at the time of the service upon him of said injunctive order, was and still is a resident of the State of New

rangement with the other party: *Cooke v. Orange*, 48 Conn. 401; and still more clearly to enforce a contract made as well as performed by himself: *Merchants' Nat. Bank v. Pennsylvania Steel Co.*, 57 N. J. L. 336, 30 Atl. 545. — Ed.

York, and prior to the time when said garnishees made and filed their answer they had notice of the appointment of the claimant as such receiver. The claimant demanded judgment that the clerk pay over said sum to him, and for his costs. The plaintiff demurred to the petition, on the ground that it did not state facts sufficient to constitute a cause of action or claim to the fund disclosed and paid into court, and for that the claimant had no legal capacity to maintain the petition. Motion was made to strike out the demurrer as frivolous, and the court so ordered, with \$10 costs, and that the claimant have judgment, with leave to the plaintiff to take issue upon said claimant's intervening petition, or such other proceedings as he might be advised, within 20 days. Plaintiff appealed from the order.¹

PINNEY, J. It is not disputed but that the proceedings in the Supreme Court of New York were properly instituted and conducted, and the dissolution of the corporation regularly adjudged, upon the voluntary application of its trustees, and the respondent appointed receiver of all its property, assets, and estate according to the statute of that State, with a view of applying the proceeds equally to the payment of all its creditors, and the distribution of any residue equally to and among its stockholders. The plaintiff in this action was at the time, and still is, a resident and citizen of the State of New York, of which State the corporation was a citizen, and he was served with an injunction in that proceeding restraining him, as a creditor of the corporation, from commencing any suit against it to enforce the collection of his debt, in order that the property and assets of the corporation might be properly and judiciously administered and applied by the receiver under the authority of the court appointing him, and in the regular and orderly administration of its estate. The proceeding did not contemplate a discharge of the debtor as upon the surrender and application of his property under insolvent laws, but the property of the corporation was passed and vested, pursuant to the statute, in the respondent as its receiver, and the corporation was dissolved, so that no other than the receiver had a right to assert or maintain any title to it thereafter, and he could do so only for the purpose of its equal and just application to the payment of its creditors, and the just division of any residue to and among its stockholders. The effect of such voluntary dissolution was to place all its property and assets *in custodia legis* to be collected and applied by the receiver. There is nothing in the statute of New York, or in this proceeding under it, in conflict with or in contravention of the laws or public policy of this State, as declared by its statutes and the decisions of its courts, nor does the present proceeding interfere, or tend to interfere, with or prejudice the rights of any citizen of this State. The case concerns citizens of New York alone, the gar-

¹ The statement of facts is slightly condensed, and arguments of council are omitted. — ED.

nishees having paid the fund into court and been discharged. The case is therefore free from all objections which, by the general current of authority, might prevent or induce the courts of Wisconsin to refrain from giving, in a spirit of just interstate comity, the same force and effect here to the proceedings in the Supreme Court of the State of New York in question as would be accorded to them there. There are many cogent reasons, in our judgment, why we should accord to them such effect upon principles of comity.

The situation in brief, is that after the plaintiff had been enjoined, by a competent court of the jurisdiction in which he resided, from bringing any action against the corporation, his debtor, for the recovery of any sum of money, so that he should not obtain any undue preference over its other creditors, in violation of the purpose and policy of the law of New York and the proceeding thus instituted, and after an adjudication absolutely dissolving the corporation had been made, and after the title to its property, effects, and credits had been vested in the claimant as such receiver, the plaintiff came into the Circuit Court of this State, and commenced an action to recover his demand against a dissolved corporation. The question is one wholly between parties residing in New York and bound by the proceedings in question, neither of whom is in any position to invoke the assistance of the courts of this State to defeat or deny full effect to the proceeding in New York, or the title resulting from it. It is clear that the adjudication of dissolution, and the appointment of the receiver vesting in him the title to the chose in action in question, were binding on these parties, and the courts of New York would have enforced the receiver's title had this controversy originated there. The plaintiff asks us to aid him in violating the law of his own State and evading the process of its courts. Our own citizens, in a proper case, would no doubt be protected against the effect of such extra-territorial act and adjudication, if injurious to their interests or in conflict with the laws and public policy of Wisconsin, and effect would not be given to it at the expense of injustice to our own citizens. The transfer of this debt, valid in New York, must, we think, be held valid on principles of comity here. When, therefore, the garnishee process was served, there was no debt due to the corporation upon which it could act, and the money that has been paid into court belongs to the receiver claimant; and, no principle of public policy or rights of citizens of Wisconsin intervening, by a fair and liberal spirit of comity our courts ought to give the same force and effect to the proceedings in question as they would have in the courts of New York.

The tendency of modern adjudications is in favor of a liberal extension of interstate comity, and against a narrow and provincial policy, which would deny proper effect to judicial proceedings of sister States under their statutes and rights claimed under them, simply because, technically, they are foreign and not domestic. In the recent case

of *Cole v. Cunningham*, 133 U. S. 107, the subject was very fully considered, and the various cases were cited; and it was there held that a creditor who is a citizen and resident of the same State with his debtor, against whom insolvent proceedings have been instituted in said State, is bound by the assignment of the debtor's property in such proceedings, and if he attempts to attach or seize the personal property of the debtor, situated in another State and embraced in the assignment, he may be restrained by injunction by the courts of the State in which he and his debtor reside; that every State exercises, to a greater or less extent, as it deems expedient, the comity of giving effect to the insolvent proceedings of other States, and where the transfer of the debtor's property is the result of a judicial proceeding, as a general rule, no State will carry it into effect to the prejudice of its own citizens. *Reynolds v. Adden*, 136 U. S. 353, 354. In *Bagby v. A., M. & O. R. Co.*, 86 Pa. St. 291, it was held that, where a receiver of a corporation has been appointed by a court of competent jurisdiction in another State, a creditor who resides in that State and is bound by the decree of its court appointing the receiver cannot, in an attachment or execution, recover the assets of the corporation in another State, which the receiver claims. In *Bacon v. Horne*, 123 Pa. St. 452, 453, speaking to this point, the court said: "As before observed, both of these parties, plaintiffs and defendant, are residents of New York. They come into this State to obtain an advantage by our law which they could not obtain by their own. They are seeking to nullify the law of their own State, and ask the aid of our court to do so. This they cannot have. If for no other reason, it is forbidden by public policy and the comity which exists between the States. This comity will always be enforced when it does not conflict with the rights of our own citizens." To the same effect is the case of *In re Waite*, 99 N. Y. 433, 439, 448, and also *Phelps v. McCann*, 123 N. Y. 641. In *Toronto General Trust Co. v. C., B. & Q. R. Co.*, 123 N. Y. 37, 47, it was said that "foreign receivers and assignees, taking their title to property by virtue of foreign laws or legal proceedings in foreign courts, may come here and maintain suits in our courts when they do not come in conflict with the rights or interests of domestic creditors;" and the general rule laid down in *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, must be considered as qualified by these cases. The same doctrine is laid down in *Woodward v. Brooks*, 128 Ill. 222, where it is held that if an assignment is valid in the State where made it will be enforced in another State as a matter of comity, but not to the prejudice of the citizens of the latter, who may have demands against the assignor; that while it is contrary to public policy to allow the property of a non-resident debtor to be withdrawn from the State, and thus compel creditors to seek redress in a foreign jurisdiction, yet for all other purposes between the citizens of the State where the assignment is made, if valid by the *lex loci*, it will be carried into effect by the courts

of Illinois; and this rule is held not to be in conflict with *Rhawn v. Pearce*, 110 Ill. 350. The assignment in this case was voluntary, it is true, and not by proceedings *in invitum*. We are unable to see upon what substantial ground it can be maintained that the title of the receiver in this case, founded upon the voluntary dissolution of the corporation, does not stand on equally as favorable ground as that of an assignee for the benefit of creditors. *Parsons v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 305; *Relfe v. Rundle*, 103 U. S. 222, 225; *Williams v. Hintermeister*, 26 Fed. Rep. 889. In *Bank v. McLeod*, 38 Ohio St. 174, it was held that a receiver appointed under the authority of the court of one State, and vested with the title to property temporarily in another, might, under the comity between States, by an action brought in the latter State in his own name, assert his right to the possession of it, where such right was not in conflict with the rights of the citizens of the latter State, nor against the policy of its laws; nor is there anything in the case of *McClure v. Campbell*, 71 Wis. 350, in conflict with this conclusion. Mr. Justice Lyon had in view in that case the question of giving effect to foreign insolvency proceedings resulting in a discharge of the debtor prejudicially to the interests of citizens of the State wherein the assignee attempted to enforce the assignment. In *Filkins v. Nunnemacher*, 81 Wis. 91, the question was whether judicial comity would allow a receiver, appointed in a creditors' suit in another State, to maintain a suit in Wisconsin to set aside an alleged fraudulent conveyance, from the debtor to the defendant, of property within the latter State, and presented an entirely different question from the one in this case, which is whether a foreign receiver can be heard to assert in the courts of this State a title to property which he claims by an assignment valid and binding against all the parties to the litigation, and is more nearly analogous to the question involved and decided in *Cook v. Van Horn*, 81 Wis. 291. The question is not materially different from that involved in *Smith v. C. & N. W. R. Co.*, 23 Wis. 267, where it was determined that effect would be given by the courts of this State, subject to the qualifications here stated, to an assignment made in another State by a party in order to avoid imprisonment in proceedings supplemental to execution for refusal to apply rights in action—corporate stocks—to the payment of a judgment; and it is evident that, if the title depended wholly upon the coercive power of the court, the result would have been the same. The principle is universal that the assets of insolvent corporations are to be regarded as a trust fund for the benefit of all the creditors, and “that kind of diligence by which one creditor of an insolvent corporation secures to himself a prior right to its property, and an unequal advantage over the other creditors, is without merit, and more selfish than just.” *Ballin v. Loeb*, 78 Wis. 404. The public policy of Wisconsin and New York in this respect are in accord.

For these reasons we are of the opinion that the claim of the

receiver, as stated in his intervening petition, to the fund in court, must be sustained, and that the Circuit Court properly overruled the plaintiff's demurrer thereto.¹

PAIGE v. SMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[*Reported 99 Massachusetts, 395.*]

CONTRACT for the value of fifty-five bales of hay. In the Superior Court facts were agreed in substance as follows: "The defendants were originally trustees of the Vermont Central Railroad, under the first mortgage bonds; and they were, prior to the year 1861, operating the Vermont Central Railroad under a possession taken under said bonds, and the Vermont and Canada Railroad under a lease, or supposed lease. A controversy arose between the Vermont and Canada, and the Vermont Central Railroad Companies, as to which of them should have a right to operate the road; a bill in equity was filed in the court of chancery in the State of Vermont; and during the pendency of said bill receivers were appointed by the court to operate said roads, and, at the time of the occurrence of the matters in controversy in this suit, the defendants were operating both of said roads, under the decree." "Prior to February 20, 1864, the plaintiff made a contract with the defendants, acting as receivers aforesaid, through their agent, for the transportation of hay, over said roads and other roads, to Boston; the terms of which contract are in dispute, and are to be shown by the plaintiff, and the defendants may also offer evidence in relation thereto. Under said contract the defendants furnished a platform car for the transportation of hay," "and Reynolds, Soule & Co., on February 20, 1864, having sold hay to the plaintiff, shipped on said car on the Vermont and Canada Railroad, for the plaintiff, fifty-five bales of the plaintiff's hay," of a value which was agreed. "Said car with said hay was, within one or two days afterwards, on its passage to Boston, and, while on the Vermont and Canada Railroad, operated by the defendants as receivers as aforesaid, burned and destroyed by fire. Either party being at liberty to prove any facts tending to show negligence or care in regard to the loss of said hay."

At the trial, before WILKINSON, J., before the plaintiff called any witnesses, the judge, at the defendants' request, ruled that on the

¹ *Acc. Schindelholz v. Cullum*, 55 Fed. 885; *Bagby v. Atlantic, M. & O. R. R.*, 86 Pa. 291. See *Faulkner v. Hyman*, 142 Mass. 53. *Contra*, *City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *Commercial Nat. Bank v. Matherwell Iron & Steel Co.*, 95 Tenn. 172, 31 S. W. 1002. — Ed.

agreed facts the plaintiff could not recover, and directed a verdict for the defendants. The plaintiff alleged exceptions.

FOSTER, J. The Supreme Court of Vermont, in an action against these defendants, held that, "if in fact they were common carriers over a line of railroad, it could be no defence to an action at law for a breach of duty or obligation arising out of business entrusted to them in that relation, that they were running and managing the line of railroad as receivers under the appointment of the court of chancery." *Blumenthal v. Brainerd*, 38 Vt. 408.

It is impossible for the courts of this Commonwealth to accord to these defendants an exemption from the ordinary common law liabilities of common carriers, more extensive than they are allowed in the State in which they were appointed receivers, and in which the accident occurred. Under these circumstances, the ordinary rule for which the defendants contend, that receivers are amenable solely to the court by which they are appointed, is inapplicable.

*Exceptions sustained.*¹

RELFE v. RUNDLE.

SUPREME COURT OF THE UNITED STATES. 1880.

[*Reported 103 United States, 222.*]

WAITE, C. J. The Life Association of America was, on the 5th of November, 1879, a corporation of the State of Missouri, for the purpose of doing a life insurance business, with its chief office at St. Louis, in that State. By the laws of Missouri, the superintendent of the insurance department of the State government might, under certain circumstances, institute proceedings in the courts of the State for the dissolution of such a corporation and the winding up of its affairs. Section 6043 of the Revised Statutes of Missouri is as follows:—

"Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee-simple and absolutely in the superintendent of the insurance department of this State, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policy-holders of such company, and such other persons as may be interested in such assets."

On the 13th of October, 1879, L. E. Alexander, a citizen of Missouri, and the receiver of the Columbia Life Insurance Company of Missouri, recovered a claim against the Life Association of America for

¹ *Acc. Phelan v. Ganebin*, 5 Col. 14; *Kain v. Smith*, 80 N. Y. 458. A receiver acting beyond the jurisdiction of his court is still subject to the directions of the court. *Guarantee T. & S. D. Co. v. P. R. & N. E. R. R.*, 69 Conn. 709, 38 Atl. 792.
—ED.

\$1,100,000, and thereupon William S. Relfe, the superintendent of the insurance department of the State, commenced proceedings under the statute to dissolve the last-named corporation and wind up its affairs. In his petition he prayed that the company might be enjoined from doing any further business, and that an agent might be appointed to take charge of its property temporarily. Such an order was made in the cause, and D. M. Frost, a citizen of Missouri, appointed temporary agent and receiver. Frost at once qualified under this appointment.

On the 5th of November, 1879, Rundle and wife, the appellees, policy-holders of the company, commenced suit in the Fifth District Court of the Parish of New Orleans, against the life association, Frost, the temporary agent and receiver, John R. Fell, the local agent of the company at New Orleans, and L. E. Alexander, receiver of the Columbia Life Insurance Company, the object of which was to have the assets of the company in Louisiana declared a trust fund and applied to the payment of the claims of Louisiana creditors and policy-holders in preference to others. In the bill the decree in favor of the receiver of the Columbia Life Insurance Company, and the proceedings by Relfe, the superintendent of the insurance department, with the appointment of Frost as temporary receiver, were set out in detail, and the whole object and purpose of the suit was to keep the Louisiana assets out of the hands of Relfe and his successors in office. No special relief was asked against the receiver of the Columbia Life Insurance Company. Upon the filing of the bill, Walter B. Wilcox was appointed receiver. Service of process was made on Alexander only through Francis B. Lee, who was appointed *curator ad hoc* at the same time that Wilcox was appointed receiver. Fell was made a party only for the purpose of reaching property in his hands.

On the 10th of November the company was dissolved by a decree of the Missouri court, and its property vested in Relfe, superintendent of the insurance department, as provided by the statute. On the 17th of the same month Relfe was, on his own motion, made a party to the suit in New Orleans, as the legal representative of the late corporation, and on the 28th he filed a petition for the removal of the cause to the Circuit Court of the United States for the District of Louisiana. In his petition he set forth his own citizenship in Missouri, and that of the appellees in Louisiana. The citizenship of all the other persons named as parties to the suit appeared in the pleadings. He also gave the security required by the act of Congress, and on the 5th of December, which was in time, filed in the Circuit Court a copy of the record in the State court. On the 9th of the same month the receiver appointed in the State court moved to dismiss the cause and strike it from the docket of the Circuit Court: 1, because that court was without jurisdiction either of the person or the subject-matter; 2, because Relfe had no standing in court, he being a creature of the State of Missouri, without capacity to sue or remove causes in Louisiana; 3,

because the suit was improperly removed; and, 4, because the State court having first taken charge of the property, the Circuit Court could not interfere with the possession of the receiver of that court. While this motion was pending, and on the 30th of December, the life association and Frost filed their petition in the State court, setting forth the former petition of Relfe, and adopting it and all that had been done under it as their own, and also asking that the suit be removed on their own account. They also gave the security required by the act of Congress. On the 5th of January the Circuit Court heard the motion of the State court receiver made on the 9th of December, and remanded the cause. From that order the life association, Relfe, and Frost took this appeal, under the fifth section of the act of 1875, c. 137. 18 Stat., pt. 3, p. 472.

We think the Circuit Court erred in remanding the cause. The entire controversy is between the appellees, representing the Louisiana creditors and policy-holders, on one side, and Relfe, the statutory representative of the corporation and its property, on the other, as to their respective rights to what the appellees claim are Louisiana assets belonging primarily to Louisiana creditors. Fell and the receiver of the Columbia Life Insurance Company are formal parties only. Fell has in his possession, as a naked trustee, some of the Louisiana assets, and the receiver of the Columbia Life Insurance Company is, so far as anything appears, no more than a general creditor of the dissolved corporation whom, necessarily, under the law, Relfe represents. After the decree of dissolution the Life Association Company had no longer any corporate existence, and the temporary agency and receivership of Frost was ended when the property of the corporation was transferred to Relfe, and he became under the law entitled to the possession.

Relfe is not an officer of the Missouri State court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the corporation itself for all the purposes of winding up its affairs.

We are aware that, except by virtue of some statutory authority, an

administrator appointed in one State cannot generally sue in another, and that a receiver appointed by a State court has no extraterritorial power; but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the State which creates it may say who those agents shall be. One may be its representative when in active operation, and in full possession of all its powers, and another if it has forfeited its charter and has no lawful existence except to wind up its affairs. No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution.

By the charter of this corporation, if a dissolution was decreed, its property passed by operation of law to the superintendent of the insurance department of the State, and he was charged with the duty of winding up its affairs. Every policy-holder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the corporation can insist shall be regarded. The appellees, when they contracted with the Missouri corporation, impliedly agreed that if the corporation was dissolved under the Missouri laws, the superintendent of the insurance department of the State should represent the company in all suits instituted by them affecting the winding up of its affairs. Relfe, therefore, became, by operation of law, the successor of the corporation in the litigation these appellees instituted in Louisiana. He was, in legal effect, their only opponent in the suit they had begun, and as he appeared in time and was a citizen of Missouri, representing a Missouri corporation, he was entitled to remove the cause and require citizens of Louisiana to litigate their claims with him in the courts of the United States.

The order of the Circuit Court remanding the suit will, therefore, be reversed, and the record remanded to that court with instructions to proceed according to law as with a pending suit within its jurisdiction by removal; and it is

*So ordered.*¹

¹ *Acc.* *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. 305; *Bockover v. Life Assoc. of America*, 77 Va. 85. *Contra*, *Willetts v. Waite*, 25 N. Y. 577. — Ed.

PEOPLE v. GRANITE STATE PROVIDENT ASSOCIATION.

COURT OF APPEALS, NEW YORK. 1900.

[Reported 161 New York, 492.]

O'BRIEN, J. The only question in this case is one concerning the distribution of a fund now under the control of the courts of this State, which is owned by a foreign corporation. The defendant corporation was created by the laws of New Hampshire as a building and loan association, and was permitted to transact business in this State. In January, 1896, the authorities of the State where this corporation is domiciled took proceedings in the courts of that State to restrain it from any further prosecution of its business. In this proceeding an assignee or trustee was appointed to take charge of the property as provided by the local law. Subsequently, this action was brought in the courts of this State by the attorney-general in behalf of the People, under the provisions of the Code, for the sequestration and preservation of the assets and property of the corporation in this State, and for an equitable distribution of the same among the persons entitled thereto. In order to carry out the objects of the action a receiver was also appointed in this State. The New Hampshire assignee upon his own application was made a party to the action, and so is bound by the judgment.

It appears from the record that the corporation transacted business in several other States. The stockholders, at the time of the appointment of the receiver in this State, exceeded in number twenty thousand, of whom nearly one-sixth were residents of this State, and about one-fourth of the assets was located here; or, at least, the situation was such that they could not be collected or distributed except through the action of the courts of this State. The fund in controversy may be divided into two parts. About \$69,000 represents assets of the corporation collected by the receiver in this action from the foreclosure of mortgages and other obligations due from parties in this State, and the sale of some realty located in this State. The securities thus collected were transmitted to the receiver by the assignee in New Hampshire under the direction of the courts of that State. The other part of the fund consists of a special deposit of \$100,000, which the corporation was required to make under the Banking Law of this State, in order to acquire the right to transact its business here.

With respect to that part of the fund first mentioned, which is described in the record as the general fund, the court below, by the amendment of the original judgment, directed the receiver in this State, after paying the expenses of the receivership, to transmit the same to the assignee in New Hampshire for general administration, upon receiving from such assignee at the domicile a bond or under-

taking in a sum equal to double the amount to be so paid over, with sufficient sureties to be approved by a justice of the court, conditioned for the payment by the assignee of the domicil to each creditor and shareholder resident in this State of the same dividend on his claim that may be awarded other creditors and shareholders throughout the country, without any deduction on account of any sum the creditor and shareholder of this State might receive from the special fund hereafter mentioned; and that in default of such payment to the domestic creditors and shareholders, that the foreign assignee would return to the receiver in this State, or his successor, the general fund so paid over. The only objection made to this part of the judgment is to the provision which requires the assignee at the domicil to execute the bond before described as a condition of receiving the fund in the hands of the domestic receiver. The general assets of a corporation are to be administered and distributed at the home of the corporation; but in order to accomplish that result, ancillary trustees or assignees must frequently be appointed in other jurisdictions, subject to the control and direction of the local courts. All creditors of a corporation, wherever residing, are entitled, in case of insolvency, to have the general assets distributed among them upon principles of perfect equality.

The courts of one State have no right to favor domestic creditors in the distribution, but it must be made upon the principle that equality is equity. *Blake v. McClung*, 172 U. S. 239.

In the case at bar the foreign assignee is a party to the action upon his own application; he asks for the transmission to him in another State of the fund now under the control and in the custody of the courts of this State through the receiver. We think that the court below, in directing the transmission of the fund to another jurisdiction, had the power to impose such conditions as are just and reasonable, with a view to the protection of domestic creditors, and that was the only purpose for which the bond or undertaking was required. We do not think it can be said, as matter of law, that the court was bound to direct the transmission of the fund to the administration at the domicil without exacting any conditions whatever. It doubtless had the power to do so if it was thought to be wise and expedient. But it determined that before sending the fund out of the jurisdiction of the court, it was just and reasonable to require the foreign assignee to give security to the effect that he would distribute the fund upon principles of perfect equality. In other words, the court had power to guard against any discrimination on the part of the foreign assignee against domestic creditors by reason of any trust fund which was held in this State for their benefit. *People v. Remington*, 121 N. Y. 328. We think, therefore, that no rule of law or any absolute legal right of the foreign assignee was violated by that provision of the judgment requiring him to give the security referred to.

The fund in the hands of the domestic receiver, arising from the

conversion of the special deposit in the banking department, stands upon a different ground. The defendant, in order to acquire the right to transact its business in this State, was obliged to make this deposit since the statute so provides. If this was a deposit as security merely for domestic creditors, we would be inclined to agree with the learned counsel for the defendant, who insists that this fund should be devoted to the benefit of all creditors equally wherever residing. But it is something more than a mere deposit as security. It is in the nature of a fund held in trust for the benefit of domestic creditors and shareholders of the defendant. The deposit was made in obedience to section fourteen of the Banking Law, as a condition of the defendant's right to transact business here. By section thirty-three it is provided, in substance, that upon the appointment of the receiver of a corporation in this State the superintendent of the banking department shall pay over to him the funds remaining in his hands, less any charges that he may have against the same, and the receiver shall distribute these funds among the creditors and shareholders of the corporation residing in this State in the manner prescribed by law for the payment of creditors in the case of voluntary dissolution of a corporation. It is apparent from the provisions of these two sections, that the securities so deposited were held by the superintendent as a trustee for domestic creditors and shareholders. The defendant corporation in making the deposit must be deemed to have consented that in case of insolvency the fund might be distributed according to the terms of the statute; that is to say, to creditors and shareholders residing in this State. So that by the act of the corporation itself, in availing itself of the benefit of the statute, it has devoted this fund to the benefit of the domestic creditors and shareholders; at least so far as to enable them to receive payment upon all their obligations in full. Therefore, the application of the fund to their benefit in the first instance does not infringe upon the provision of the Federal Constitution that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. *Blake v. McClung, supra.*

The court below, therefore, directed that this fund be disposed of in the following manner, after paying the expenses of administration: (1) In case the foreign assignee should give the undertaking provided for, with respect to the general fund, and the whole fund received by him was insufficient to pay all the creditors throughout the country in full, then the domestic receiver should pay from this special fund the balance of all just claims due to the creditors residing within this State at the time of his appointment, and after such payment distribute the balance of the special fund remaining in his hands among the different shareholders residing within this State until they were paid in full.

(2) In case the fund in the hands of the foreign assignee should prove to be sufficient to pay all the creditors in full, but insufficient to pay the shareholders throughout the country in full, then the domestic

receiver should distribute the balance remaining in his hands to the domestic shareholders at the time of his appointment until they were paid in full.

(3) That in case anything remained in his hands after paying the claims of the creditors, and shareholders in this State in full and all expenses, the same should be paid to the assignee at the place of the domicile.

Assuming that the special deposit referred to was a fund held in trust here for the benefit of domestic creditors and shareholders, as we think it was, there is no legal error in this principle of distribution. It is quite true, as the counsel for the defendant suggests, that it impounds a large sum, a part of the assets of the corporation, for the benefit of creditors here. But we think the answer to all that is, that there is no injustice in devoting the fund to the very purpose for which it was created and sent here. The corporation could have declined to enter the State upon such conditions, but having accepted them by making the deposit, no creditor or shareholder in any other State can complain because the courts of this State have, with the consent of the corporation, devoted the fund in the first instance to the payment of home creditors and shareholders. The defendant virtually consented, when it made the deposit, that it should be distributed in this manner in case of insolvency.

The judgment appealed from should, therefore, be affirmed, with costs to the foreign and domestic receivers, respectively, to be paid out of the general fund.

PARKER, Ch. J. (dissenting). I am unable to agree with so much of the judgment about to be affirmed as requires the New Hampshire assignee to give an undertaking as a condition precedent to his receiving the moneys, which the court holds he should receive, for distribution to general creditors. This does not involve the special fund of \$100,000, deposited with the superintendent of banks for the benefit of creditors residing within this State, but relates solely to the fund resulting from the foreclosure of mortgages and other assets of the Granite State Provident Association, that were by the courtesy of the New Hampshire court and the assignee turned over to a receiver in this State of the property of that corporation situated here. The New Hampshire court did not require that the New York ancillary receiver should give a bond on the turning over of such assets for collection, and if the proceeds, less the expenses of collection and of administration, should be transmitted to the New Hampshire assignee to be distributed, as all are agreed it should be, like courtesy commands that it should go unhampered by any condition whatever. Comity requires that full faith and confidence should be given to the Supreme Court of New Hampshire, and the presumption ought to be indulged that that court will compel the assignee to make a just distribution of the fund which may be in his hands, and will not countenance any dereliction of duty on his part. The precedent that this decision will constitute

seems to me an unfortunate one, with decidedly mischievous tendencies in a country having forty-five States, with necessarily as many independent jurisdictions. I advise that the money be paid without condition.

All concur, with O'BRIEN, J., for affirmance, except PARKER, C. J., who reads dissenting opinion. *Judgment affirmed.*¹

¹ An ancillary receiver may be appointed to take charge of the assets within the State. *Williams v. Hintermeister*, 26 Fed. 889; *Holbrook v. Ford*, 153 Ill. 633, 39 N. E. 1091; *Evans v. Pease*, 21 R. I. 187, 42 Atl. 506. This is merely discretionary with the court, which may refuse to make the appointment. *Irwin v. Granite State Provident Assoc.*, 56 N. J. Eq. 244, 38 Atl. 680; *Borton v. Brines-Chase Co.*, 175 Pa. 203, 34 Atl. 597. Thus where there were no domestic creditors, so that the principal receiver would be allowed to take the assets, the court refused to appoint an ancillary receiver, since the only effect of doing so would be to increase the expenses. *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805.

The ancillary receiver has power to take only property within the jurisdiction of the court. *Reynolds v. Stockton*, 140 U. S. 254; *Holbrook v. Ford*, 153 Ill. 633, 39 N. E. 1091. He may, however, like any receiver, do acts in connection with the estate outside the jurisdiction. *Guarantee T. & S. D. Co. v. P. R. & N. E. R. R.*, 69 Conn. 709, 38 Atl. 792.

When the assets have all been collected, the creditors within the jurisdiction, at least, may be paid the proper proportionate part of their debts. *Fawcett v. Order of Iron Hall*, 64 Conn. 170, 29 Atl. 614; *Failey v. Fee*, 83 Md. 83, 34 Atl. 839. In the Southern District of New York the federal courts pay resident creditors in full, or to the extent of the assets. *Sands v. Greeley*, 83 Fed. 772. Or in its discretion the court may order the assets transmitted to the principal receiver, to be administered along with the principal estate; but this will not be done until the court is sure that the creditors within its jurisdiction will share proportionately with all other creditors. *Buswell v. Order of Iron Hall*, 161 Mass. 224, 36 N. E. 1035; *Baldwin v. Hosmer*, 101 Mich. 119, 59 N. W. 432. — ED.

CHAPTER XV.

JUDGMENTS.

SECTION I.

THE NATURE OF A JUDGMENT.

SAWYER v. MAINE FIRE AND MARINE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[Reported 12 *Massachusetts*, 291.]

THIS was an action of the case upon a policy of insurance, dated March 20th, 1812, for \$6,000 upon the brig "Lydia," valued at \$7,000, at and from Portland to one or more ports in the West Indies, and at and from thence to her port of discharge in the United States, against capture and condemnation only. The plaintiffs declared for a total loss by capture, in the first count, by a vessel unknown, belonging to citizens of Hispaniola; and in the second count by pirates, rovers, &c., on the 19th of April, 1812.

On the trial before PUTNAM, J., at the sittings here by adjournment of the last October term, it appeared that proof of the loss was made, and an abandonment offered, on the 14th of May, 1812. The policy and interest were admitted.

The plaintiffs proved that, at the time of making the insurance, it was stated to the defendants that the vessel was bound to Port au Prince. They also read the deposition of Elisha Sawyer (a copy of which came up in the case), stating that he was master of the said vessel on the voyage insured: that on arriving in sight of Port au Prince he was hailed by an armed brig belonging to the king of Hayti, and ordered to come on board. The captain then informed the witness that he was fighting against Petion, who had possession of Port au Prince, that the king of Hayti wanted his provisions, and that if he, the witness, would go to St. Mark's, he should have a good price for his cargo; but that if he refused he should send him. On the witness refusing, a prize master and five men were put on board the brig, and an armed schooner accompanied her to St. Mark's. On his arrival there he was ordered on shore, and was carried before the prince Gonaive, who said he wanted the cargo, and would pay the witness for it. The prince then ordered the sails taken from the brig and

brought on shore, and twelve men were placed on board. The witness then went on board the vessel, and on the third day after was, with all his crew, ordered on shore; and on being carried before the minister of justice so called, he read to them a condemnation of the vessel and cargo. The next day the vessel was sold and the cargo taken out and put into the king's warehouse. The vessel was purchased by Messrs. Dodge and Myers, of Philadelphia, for the master, at the price of \$4,000, and he went in her to Philadelphia, where he sold her. He had never heard of the blockade of Port au Prince before his capture. The king of Hayti and all his officers were black, except his majesty's interpreter, who was a mulatto. The principal facts in the master's deposition were confirmed by the testimony of the mate of the vessel. The defendants produced a copy of the condemnation, which came up in the case, and contended that it thereby appeared that the brig was condemned for a violation of the blockade of Port au Prince by the emperor of Hayti; and that the decree was to be considered as conclusive evidence of the facts thereby decided.

There was no evidence that Port au Prince was in fact blockaded at the time of the capture, other than what arises from the said decree of condemnation. Nor was there any evidence that the brig was notified of any blockade, or warned not to enter for that cause prior to the capture. The collector of the customs for the district of Portland testified that, since the expiration of the law of the United States prohibiting intercourse with St. Domingo, many clearances had been made from the United States for Port au Prince, and many clearances from Hayti to the United States. It was in evidence that Christophe, or Henry, was the sovereign *de facto* of Cape François and of that part of the island; and that Petion was the sovereign *de facto* of Port au Prince; that Petion and Christophe are at war with each other, each declaring the other to be in rebellion against France; but each claiming to have authority in his own dominions: that they have their custom houses and custom house officers: and ships of many nations, English, Spanish, American, &c. trade there, and business is regularly transacted; that the United States have had a consul at Cape François, since the government has been in rebellion against France: particularly that Col. Lear was consul there when Toussaint was regent: that protests, decrees, and other proceedings of the admiralty courts from Cape François are frequently seen in the United States: and that a proclamation of the blockade of Port au Prince by Christophe, or king Henry, was published here in June, 1812.¹

The judge instructed the jury that the decree must be considered as conclusive evidence that the vessel was condemned for violation of blockade.

The jury accordingly returned a verdict for the defendants, which was taken subject to the opinion of the court in the premises. If that

¹ Part of the statement of facts and part of the opinion, involving the claim of partial loss, are omitted. — Ed.

opinion should be, that the said decree does decide and is conclusive evidence of a violation of blockade by the vessel the verdict was to stand: otherwise the defendants were to be defaulted, and judgment was to be rendered for a total or partial loss, in such sum as, upon the facts before stated, the court should determine the plaintiffs ought to recover.

PARKER, C. J. The decree offered in this case, as conclusive evidence of a violation of blockade by the vessel insured, cannot be held so to operate. Indeed it may be doubtful whether it ought to have been admitted at all.

Waiving all question as to the character of the government, under which the seizure of the vessel and the decree of forfeiture took place, it certainly is essentially defective when attempted to be applied to this contract of insurance.

For it does not appear that any libel was filed, any monition issued, any hearing had, or that any of those formalities had taken place, which are necessary to give a conclusive operation to decrees of foreign courts. For aught that appears from the copy of the proceedings before us, the forfeiture was decreed by mere arbitrary power, without any trial; and that some of the forms of justice, used in civilized countries, had been assumed, without any regard to the substantial requisites of a judicial inquiry.

Considering the decree then as not conclusive, the facts, which it purports to establish, are abundantly disproved by the other testimony in the case: so that the seizure of the vessel must be taken to have been an act of unjustifiable violence, for which the underwriters are undoubtedly answerable. . . .

*Defendants defaulted.*¹

¹ But see *The Helena*, 4 C. Rob. 3 (1801). In that case Sir W. SCOTT said: "The ship appears to have been taken by the Algerines, and it is argued that the Algerines are to be considered in this act as pirates, and that no legal conversion of property can be derived from their piratical seizure. . . . Although their notions of justice, to be observed between nations, differ from those which we entertain, we do not, on that account, venture to call in question their public acts. As to the mode of confiscation, which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly in their way, and according to the established custom of that part of the world. That the act of capture and condemnation was not a mere private act of depredation, is evident from this circumstance, that the Dey himself appears to have been the owner of the capturing vessel; at least he intervenes to guarantee the transfer of the ship in question to the Spanish purchaser. There might perhaps be cause of confiscation, according to their notions, for some infringement of the regulations of treaty; as it is by the law of treaty only that these nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations, but that which is derived from positive compact and convention. Had there been any demand for justice in that country on the part of the owners, and the Dey had refused to hear their complaints, there might perhaps have been something more like a reasonable ground to induce this court to look into the transaction, but no such application appears to have been made. The Dey intervened in the transaction as legalizing the act."

In *Fracis v. Carr*, 82 L. T. Rep. 698 (1900), WILLIAMS, L. J., said: "We are not satisfied that the document issued by the Muscat court was an adjudication by a court

FOOTE v. NEWELL.

SUPREME COURT, MISSOURI. 1860.

[Reported 29 Missouri, 400.]

SCOTT, J.,¹ delivered the opinion of the court.

This is an action on what is alleged to be a judgment of the court of a sister state.

The petition states that the plaintiff, at a term of the Circuit Court for Wayne County, in the State of Indiana, on the 2d day of November, 1840, recovered a judgment in debt for \$201.25 against the defendants Curtis, Newell, and Hiram Morlan; that afterwards, in November, 1840, an execution issued on said judgment against said defendants indorsed by the clerk of said court; that the same was for making the sum therein named with interest therefrom from the 4th of November, 1840, and might be replevied according to law; which said execution was afterwards, to wit, on the 30th day of January, 1841, returned by the sheriff of the said county of Wayne, indorsed "replevied by taking a replevin bond" and returning the same to the clerk of said court, executed by the defendants Hiram Morlan, Charles B. Newell, Joshua Cranor, and Harmon Roland, on the 30th day of January, 1841, to the plaintiffs in the sum of \$419.41, conditioned that should the said obligors, or either of them, well and truly pay to the said plaintiffs the said sum of \$201.25, the amount of said judgment, together with the interest and costs accruing and to accrue thereon, at the expiration of the time given by law, the said bond to be null and void; otherwise to remain in full force; which said bond was duly entered by the clerk of said court on the order book of said court; all of which will more fully appear by a duly and legally certified copy of said judgment and bond, with all the proceedings done and had thereon herewith filed. The petition further alleged that by virtue of an act of the general assembly of the State of Indiana entitled "An act subjecting real and personal property to execution" approved January 4, 1831, and in force at the rendition of the said judgment, of issuing said execution, and of taking, returning, and entering said bond on the order book of said court, the said bond, so entered into by the said obligors and so entered on the order book of said court, became, and from the date thereof had

of justice determining the status or ordering the disposition of goods seized within Muscat territory; and we wish to add that, even if we were so satisfied, we should hesitate to hold that our courts ought to give effect to a judgment as to which there is no evidence of any public notice of the intention to hold the inquiry which resulted in the judgment. But quite apart from any replication impeaching the judgment as against natural justice, the onus of proving which would be on the plaintiffs [who denied the force of the judgment], there seems to be no judgment *in rem*." — ED.

¹ Part of the opinion, discussing the application of the Statute of Limitations, is omitted. — ED.

the force and effect of, a judgment confessed in said court by the said obligors so executing the said bond and against their estates, and execution might issue thereon accordingly. The petition then recites some payments on the judgment, and states the balance of it to be \$61.83 with interest, and that the judgment for the amount is still in force and effect and unreversed and unsatisfied; and that the said bond still remains in full force and effect, not reversed, satisfied, or otherwise vacated; whereby an action has accrued to the plaintiffs to demand and have of the defendants the sum of \$419.41, and therefore ask judgment for that amount.

Two of the defendants answered, Joshua Cranor and Chas. Newell, denying that any action accrued on the bond to the plaintiffs whereby they were bound for the sum claimed in the petition. They deny that they were ever served with any process, and plead the statute of limitations of ten years. There were motions to strike out the answer and parts of it, which were overruled. The suit was discontinued as to the defendants not answering. By consent the cause was submitted to the court. The record of the Indiana judgment, and the subsequent proceedings thereon as stated in the petition, were read in evidence. The statute of Indiana was also read in evidence, which directed the bond, executed under the circumstances detailed in the petition, to be taken as, and have the force and effect of, a judgment confessed in a court of record against the person or persons executing the same and against their estates. The court refused an instruction, asked by the plaintiffs, that the act of the legislature of the State of Indiana read in evidence gives to the bond in evidence in this cause the force and effect of a judgment confessed in the Circuit Court of Wayne County, in the State of Indiana, against the parties to said bond, and said judgment is binding and obligatory on the defendants in the courts of this State, and may be sued upon as a judgment of a court of record, and judgment may be recovered on the same in the courts of this State. There was a judgment for the defendants.

The constitution of the United States prescribes that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. The act of Congress of May 26, 1790, pointed out the manner of authenticating the said acts, records, and proceedings, and declared that the records and proceedings should have such faith and credit given them in every court within the United States as they have by law and usage in the courts of the State from whence the said records are or shall be taken. The question involved in this cause is not what faith and credit shall be given to a judicial proceeding of a sister State, but whether the instrument, the foundation of the action, is a judicial proceeding within the meaning of the constitution and the law. Indeed, if this is a judicial proceeding, it is difficult to find a reason why a State may not declare any contract or

undertaking, on being filed with the clerk of a court of record, a judgment by confession and having the force and effect of a judgment, and thus make it a judicial proceeding within the meaning of the Federal Constitution. The statute of Indiana itself did not regard the proceedings under the execution as judicial, for if it had been so regarded it would not have been necessary to declare that the bond be taken as, and have the effect of, a judgment confessed in a court of record. It is not usual for a tribunal performing judicial acts to declare the character of the acts; it is sufficiently apparent from the face of the proceedings themselves.

If a State, in carrying out a policy of her own, disapproved or discountenanced in other States, finds it convenient to give to proceedings having no affinity to judicial ones the force and effect of judgments, the other States are not required by the constitution to give to those acts the force and effect they may have in the State by which they were authorized. Comity requires that nations should respect the judicial proceedings of each other. The constitution exacts this comity between the States as a duty and carries it further than the comity among foreign nations extends. Under these circumstances, it would be great perversion to require the States to give to any contract or undertaking, declared by a State to be a judgment for the sake of a speedy remedy, the force and effect of a judicial proceeding. The bond is a penal one, being for a sum double the amount of the original judgment. We know how to deal with a penal bond; but what is to be done with a penal judgment? The plaintiffs claim the amount of the penal bond, which they maintain is a judgment within the meaning of the constitution of the United States. We are not informed whether, by the law of Indiana, an execution issues for the entire penalty, or for the amount due on the original judgment. We may form a conjecture on this subject, but how singular in judicial proceedings is a judgment for a penal sum to be discharged by the payment of a less at a given time, otherwise to remain in full force. The statutory proceedings and judgment on a penal bond furnish no support to such a course. In such cases, the amount of the damages is ascertained for which the execution is awarded. Can this judgment be said to be final and complete at the date of the bond, if its existence or non-existence is made by its terms to depend on the happening of a future event? Before the courts here can declare that this is a judgment to be carried into effect under the constitution, must not the court of the State, where it was rendered, have previously determined whether the event had occurred on which its validity is made to depend? If our courts do this, are they not merely rendering a judgment in the first instance ancillary to the foreign courts, not carrying their judgments into effect, but aiding them in forming the original judgment?¹

¹ *Acc. Sevier v. Roddie*, 51 Mo. 580. — ED.

REYNOLDS v. STOCKTON.

SUPREME COURT OF THE UNITED STATES. 1891.

[*Reported 140 United States, 254.*]

ERROR from the Court of Chancery of the State of New Jersey.

The facts are these: In the year 1872 there were two life insurance companies; one the The New Jersey Mutual Life Insurance Company, a New Jersey corporation, doing business at Newark, New Jersey, and the other the Hope Mutual Life Insurance Company, a New York corporation, doing business in the city of New York. In December of that year an agreement was made between the two companies by which the New Jersey company reinsured the risks of the New York company, took its assets and assumed its liabilities. From that time the business of the two companies was done in the name of the New Jersey company, until January, 1877, when that company failed, and its assets were taken possession of by the New Jersey Court of Chancery, which appointed Joel Parker receiver. Subsequently he was appointed ancillary receiver by the Supreme Court of New York, in a suit instituted therein by the attorney general of New Jersey, and William Geasa, a creditor; and as such ancillary receiver, received the sum of \$17,040.59. Prior to 1886, he resigned his position as receiver under appointment of the Court of Chancery of New Jersey, and was succeeded by Robert F. Stockton, the present receiver. No substitution was made in New York in respect to the ancillary receivership. On March 22, 1886, an order was entered in the suit pending in the Supreme Court of New York, making certain allowances to counsel, referee, and receiver out of the funds in the hands of the ancillary receiver, and directing him to pay over the balance to the receiver appointed by the Court of Chancery of New Jersey, and discharging him, and the sureties on his bond as ancillary receiver, from all further liability, on compliance with this order. This order was complied with, and the balance of the funds turned over to the New Jersey receiver. Subsequently to these proceedings, and on the 11th day of October, 1886, a judgment was entered in the Supreme Court of the State of New York as follows: "It is adjudged that the plaintiffs recover of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and against the New Jersey Mutual Life Insurance Company, the sum of one million and ten thousand four hundred and ninety-six dollars and twenty-nine cents, the money so recovered to be brought by the plaintiffs into court and distributed in accordance with the provisions of the original decree herein, and such further directions as may be made by the court herein on the application of any party in interest."

This is the judgment whose non-acceptance by the Court of Chancery

in New Jersey produces the present controversy. The contentions of the defendant are that this judgment was entered in the absence of the defendant, and was not responsive to the issues presented by the pleadings, and therefore might rightfully be ignored by every other tribunal; and, secondly, that if by any strained construction of the pleadings it could be held responsive thereto, it was entered against a party who had ceased to have the right to represent the defendant's interest, and, because of the absence of the real representative of the defendant's interest, was a judgment in a suit *inter alios*, and not obligatory upon the defendant.

For a clear understanding of the questions presented by these defences a further statement of facts is necessary. Prior to the reinsurance, and when the New York company was acting as an independent company, it had, in obedience to the laws of New York, deposited with the superintendent of the insurance department of that State one hundred thousand dollars, in accepted securities, as a fund for the protection of its policy holders. After the contract of reinsurance, after the failure of the New Jersey company, and the appointment of Parker as its receiver, and after his appointment as ancillary receiver by the court of New York, and on February 7, 1889 [1879], a suit was commenced in the Supreme Court of New York, entitled as follows:

“New York Supreme Court, Kings County.

“Henry E. Reynolds, individually, and Henry E. Reynolds as Executor, and Georgiana L. Reynolds as Executrix of the last will and testament of Moses C. Reynolds, deceased; Hervey B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John P. Traver, Plaintiffs,

against

“John F. Smith, as Superintendent of the Insurance Department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company; and the said The New Jersey Mutual Life Insurance Company; Defendants.

} Complaint.”

The plaintiffs in that suit were policy holders in the New York company, with one exception, and that is the last-named plaintiff, who was a stockholder therein. This suit was obviously *quasi in rem*, one to seize and appropriate to the claims of these various plaintiffs the securities deposited by the New York company, as a trust fund, with the superintendent of the insurance department.

On October 11, 1886, the judgment was entered in favor of the

plaintiffs for one million and odd dollars, as heretofore stated. The Court of Chancery of New Jersey, when this judgment was presented, declined to recognize this as an adjudication against the existing receiver or the assets of the insurance company in his hands.¹

BREWER, J. We are of opinion that the decision of the Chancery Court of New Jersey, as sustained by the Court of Errors and Appeals of that State, is correct, and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York was not responsive to the issues presented. The section of the Federal Constitution which is invoked by plaintiffs is section 1 of Article IV., which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other State in and of themselves require. It does not demand that a judgment rendered in a court of one State, without the jurisdiction of the person, shall be recognized by the courts of another State as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other State. The requirements of that section are fulfilled when a judgment rendered in a court of one State, which has jurisdiction of the subject-matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another State. The scope of this constitutional provision has often been presented to and considered by this court, although the precise question here presented has not as yet received its attention. It has been adjudged that the constitutional provision does not make a judgment rendered in one State a judgment in another State upon which execution or other process may issue; that it does not forbid inquiry in the courts of the State to which the judgment is presented, as to the jurisdiction of the court in which it was rendered over the person, or in respect to the subject-matter, or, if rendered in a proceeding *in rem*, its jurisdiction of the *res*. Without referring to the many cases in which this constitutional provision has been before this court, it is enough to notice the case of *Thompson v. Whitman*, 18 Wall. 457. The view developed in the opinion in that case, as well as in prior opinions cited therein, paves the way for inquiry into the question here presented. If the fact of a judgment rendered in a court of one State does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject-matter, it certainly also does not preclude inquiry as to whether the judgment so

¹ The statement of facts has been somewhat condensed. Arguments of counsel are omitted. — Ed.

rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it. Take an extreme case: Given a court of general jurisdiction, over actions in ejectment as well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same State. If not there, the constitutional provision quoted gives no greater force to the same record in another State.

We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And without amendment of the pleadings, a judgment for the recovery of the possession of real estate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a State, as to all subsequent inquiries in the courts of the same State, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one State to judgments rendered in the courts of another State.¹

¹ The learned judge here cited and examined the following cases: *Munday v. Vail*, 34 N. J. L. 418; *Unfried v. Herberer*, 63 Ind. 67; *Goucher v. Clayton*, 11 Jur. (N. S.)

But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same State; and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another State.

This proposition determines this case; for, as has been shown, the scope and object of the suit in the New York court was the subjection of the fund in the hands of the superintendent of the insurance department of that State to the satisfaction of claims against the New York company. The cause of action disclosed in the original complaint was not widened by any amendment; and there was no actual appearance by the receiver Parker or the New Jersey company subsequently to the filing of their answer. No valid judgment could, therefore, be rendered therein, which went beyond the subjection of this fund to those claims.

But another matter is also worthy of notice. At the time of the rendition of this judgment in the Supreme Court of New York, Parker had lost all authority to represent the New Jersey company. His authority in New Jersey, the State of primary administration, had been transferred to Stockton, the present receiver. By a decree in the very court, and in the very suit in the State of New York, in which he had been appointed ancillary receiver for that State, a decree had been entered discharging him from further power and responsibility. If it be said that the attention of the court in which the judgment in question was entered had not been called to this loss of representative power on the part of Parker, a sufficient reply is, that if the power was gone it is immaterial whether the court knew of it or not. Whatever reservation of power a court may have by *nunc pro tunc* entry to make its judgment operative as of the time when the representative capacity in fact existed, it is enough to say that no exercise of that power was attempted in this case. Suppose it had been, or suppose that Parker, as ancillary receiver, had not been discharged by any order in the New York court, would the administration of this estate in the Chancery Court of New Jersey, through a receiver appointed by it, or the assets in the hands of such receiver, be bound by this decree entered in the court of New York? Clearly not. The idea which underlies this runs through all administration proceedings, and has been recently considered by this

107, 34 L. J. (N. S.) Ch. 239; *Packet Co. v. Sickles*, 24 How. 333; *Smith v. Ontario*, 18 Blatch. 454; *King v. Chase*, 15 N. H. 9. — ED.

court in the case of *Johnson v. Powers*, 139 U. S. 156. If Parker had still remained the ancillary receiver in the State of New York, a judgment rendered against him as such would bind only that portion of the estate which came into his hands as ancillary receiver, and would not be an operative and final adjudication against the receiver appointed by the court of original administration. Where a receiver or administrator or other custodian of an estate is appointed by the courts of one State, the courts of that State reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the State. Whatever orders, judgments, or decrees may be rendered by the courts of another State, in respect to so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another State, come within the same rule of conclusiveness. Beyond this, the proceedings of the courts of a State in which ancillary administration is held are not conclusive upon the administration in the courts of the State in which primary administration is had. And this rule is not changed, although a party whose estate is being administered by the courts of one State permits himself or itself to be made a party to the litigation in the other. Whatever may be the rule if jurisdiction is acquired by a court before administration proceedings are commenced, the moment they are commenced, and the estate is taken possession of by a tribunal of a State, that moment the party whose estate is thus taken possession of ceases to have power to bind the estate in the court of another State, either voluntarily or by submitting himself to the jurisdiction of the latter court. So, as *Stockton*, the receiver appointed by the Chancery Court of New Jersey, the court having primary jurisdiction, was not a party to the proceedings in the New York court, and was not authoritatively represented therein, the judgment, even if responsive to the issues tendered by the pleadings, was not an adjudication binding upon him, or the estate in his hands.

For these reasons the decree of the court below was correct, and it is *Affirmed.*

NOUVION v. FREEMAN.

HOUSE OF LORDS. 1889.

[*Reported 15 Appeal Cases, 1.*]

LORD HERSCHELL.¹ My Lords, this appeal arises in an action brought by the appellant, the plaintiff below, for the administration of the estate of a deceased gentleman named Henderson. In order to found

¹ The opinion of Lord HERSCHELL only is given. Lords WATSON and BRAMWELL delivered concurring opinions. — ED.

his claim to an order for the administration of that estate it became necessary for him to show that he was a creditor of the deceased. The case presented by him for the purpose of making that out was that he had obtained a judgment of a foreign court upon which he was entitled to sue in this country, and which in this country established the existence of a debt. Under those circumstances the court ordered that there should be first tried the issue, "whether the judgment or decree" upon which he relied, one pronounced on the 5th of April, 1878, "and the other judgments or decrees whereof particulars have been delivered, or any and which of them, are orders or judgments upon which the claim of the plaintiff in this action or some and what part of it can be sustained."

It appears that Mr. Henderson, the administration of whose estate is in question, had purchased certain properties in the district of Seville of the plaintiff, Mr. Nouvion, and that the deeds by which these properties were conveyed, and which contained an obligation to make certain payments, were registered in the registry of the district of San Roman, and where deeds of that description are so registered, according to the law of Spain, the person who is entitled to payment under them can obtain what is called an "executive" judgment.

It is necessary to state distinctly what the nature of that judgment is; because I think it will be found that the decision of your Lordships must be determined by that consideration. In an action of this nature only a very limited number of defences can be raised by the person sued. He cannot impeach the instruments upon which the action is founded, or show that they were obtained by fraud, or that on any other ground they did not properly form the basis of an obligation on his part. He can only defend himself by such defences as are open to him on the assumption that the deeds were valid, and in the first instance did create the obligation. He may show that there has been a waiver, or that he has discharged the obligation by payment or otherwise, but substantially I think those are the only defences open to him. It is open to either of the parties to such an instrument to sue in the same court in another form of action, which is called a declaratory or plenary action, and which is said to be the ordinary course, not as meaning that the other is a course which can only be taken under exceptional circumstances, but that the one conforms to the general and ordinary rules of procedure in an action in the Spanish courts, and that the other is a special procedure allowed in particular cases. In such a plenary action, to which either of the parties may have recourse, every defence which may be available is open as well as every consideration establishing the ground of action; and such a plenary action may be instituted by either of the parties to the executive action; that is to say, the party against whom the decision has been pronounced in the executive action, be he plaintiff or defendant, is at perfect liberty to sue in a plenary action for the purpose of obtaining a declaration of the rights of the parties; and in such a plenary action

the fact that a judgment has been delivered in an executive action cannot be set up as at all affecting the rights of the parties, either in the way of proof or of title to succeed in the plenary action. The same points which have been decided in the executive action can again be raised in the plenary action, as well as other questions which were not open in the executive action. No effect is given, in the court in which it was pronounced and in which afterwards the plenary action may be pending, to the judgment in the executive action as being *res judicata* and as finally concluding the rights of the parties upon any point whatever.

My Lords, in the present case the plaintiff, Mr. Nouvion, who was a party to the agreements which I have mentioned, and which had been duly registered, brought an executive action, and in that executive action a decree was pronounced in these terms: "Let an order of execution be issued against the property and goods of Mr. William Henderson for the principal amount of 697,135 reales, 60 centimos, and also for the amount of the legal interests thereon from the date of default being made by not meeting" certain drafts which are there mentioned.

It appears that owing to the absence of Mr. Henderson from Spain it became necessary, in accordance with the procedure of the Spanish courts, to send letters requisitorial to this country, that is to say, to Scotland, where Mr. Henderson was resident, and to obtain from the Spanish consul in Scotland a return to those letters, which intimated that Mr. Henderson had not discharged, as he would then have had an opportunity of doing, the liability which was declared by the judgment. Thereupon Mr. Henderson having intervened and having alleged that the debt was not due by reason of a promise of the plaintiff not to sue him, and that point having been decided against him, a decree was made which I think may properly be termed a final decree in that action, that the distraint be carried into effect, "and in virtue thereof sale by auction be made of the property attached, and out of the proceeds thereof entire and complete payment to the executive plaintiff of the amount of the principal demanded" with interest and costs.

My Lords, the plaintiff relies upon that judgment as being sufficient to entitle him, when he sues upon it in the courts of this country, to a judgment for the amount of the debt for which it was ordered that execution should issue, and the only question in this case is whether, under the circumstances which I have mentioned, that judgment is sufficient to entitle him in the courts of this country to a judgment for his debt as being a creditor of the deceased person, Mr. Henderson.

Now, my Lords, there can be no doubt that in the courts of this country, effect will be given to a foreign judgment. It is unnecessary to inquire upon what principle the courts proceed in giving effect to such a judgment, and in treating it as sufficient to establish the debt. Reliance was placed upon a dictum by Parke, B., and Alderson, B., in the case of *Williams v. Jones*, 13 M. & W. 628, 633, where

the law is thus stated: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a court of competent jurisdiction, such judgment being final and conclusive. I shall of course have something to say upon the meaning which must be given to those words, but the general proposition in that form is not disputed by the learned counsel for the appellant. They contend that this judgment is final and conclusive, and no doubt in a certain sense that must be conceded. It puts an end to and absolutely concludes that particular action. About that there can be no manner of doubt—in that sense it is final and conclusive. But the same may be said of some interlocutory judgments upon which there can be no question that an action could not be maintained; they do settle and conclude the particular proceeding, the interlocutory proceeding, in which the judgment is pronounced. It is obvious, therefore, that the mere fact that the judgment puts an end to and finally settles the controversy which arose in the particular proceeding, is not of itself sufficient to make it a final and conclusive judgment upon which an action may be maintained in the courts of this country, when such judgment has been pronounced by a foreign court.

My Lords, I think that in order to establish that such a judgment has been pronounced it must be shown that in the court by which it was pronounced it conclusively, finally, and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties. If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our courts for the payment of that debt.

The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the courts of another country

we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present case, the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the courts of this country would proceed in enforcing a foreign judgment altogether fails.

It has been suggested that a judgment obtained in an "executive" action may be regarded as analogous to a judgment obtained in a common law action in the time prior to the Judicature Act, the execution of which might be restrained by a Court of Equity, so as to prevent the plaintiff who had succeeded in such an action from obtaining the fruits of his judgment. I do not think that such an analogy is a complete one; but even if it were more complete than I think it to be, it appears to me that it would afford very little assistance to your Lordships unless we could know what had been the course adopted with regard to such judgments in countries in whose system of law the same force and effect are given to foreign judgments as are given in the courts of this country. Upon that point we have had no information whatsoever.

Then, my Lords, it is said that such a judgment is analogous to a judgment which has been obtained upon which a suit may be instituted in the courts of this country, even although an appeal may be pending. It appears to me that there is a vital distinction between the two cases. Although an appeal may be pending, a court of competent jurisdiction has finally and conclusively determined the existence of a debt, and it has none the less done so because the right of appeal has been given whereby a superior court may overrule that decision. There exists at the time of the suit a judgment which must be assumed to be valid until interfered with by a higher tribunal, and which conclusively establishes the existence of the debt which is sought to be recovered in this country. That appears to me to be in altogether a different position from a "remate" judgment, where the very court which pronounced the "remate" judgment (not the Court of Appeal) may determine, if proper proceedings are taken, that the debt for which this "remate" judgment is sought to be used as conclusive evidence has no existence at all.

My Lords, the plaintiff in such a suit, an executive suit, is not, by the decision which is now under appeal, deprived of his rights. He may still sue upon the original cause of action. Of course it may happen, as in this particular case, that such a suit is barred by lapse of time, but that is an accident. The right of the plaintiff to sue on his original cause of action is not at all interfered with by the judgment which has been pronounced; and in such an action, if it were brought, all questions upon which the rights of the parties depend, and by the solution of which the obligation to pay must ultimately be determined,

would be open to consideration and could be dealt with by the courts, and finally and conclusively settled. I do not, therefore, see that there is any wrong or any hardship done by holding that a judgment which does not conclusively and forever as between the parties establish the existence of a debt in that court cannot be looked upon as sufficient evidence of it in the courts of this country.

Very ingenious arguments have been urged upon your Lordships by the learned counsel for the appellant, and they have strenuously contended that the proper course would be to permit such a judgment to be sued upon and that justice might be done by staying proceedings as might be done in the case of an English judgment sued upon, which was under appeal.

But no authority has been cited, no case has been referred to, which supports the view put forward on the part of the appellant that an action upon such a judgment as this could be maintained, and I certainly cannot advise your Lordships to make such a precedent, because it appears to me, after giving due weight to all the arguments of the learned counsel for the appellant, that on the whole the result would as a general rule be likely to be mischievous and to work injustice rather than justice between the parties.

For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.¹

PAINE v. SCHENECTADY INSURANCE CO.

SUPREME COURT OF RHODE ISLAND. 1877.

[Reported 11 *Rhode Island*, 411.]

DURFEE, C. J. This is an action of assumpsit to recover damages for breach of contract. It was commenced in the court of Common Pleas, August 27, 1870. The plaintiff recovered judgment in that court at the December Term, 1875. The defendant appealed to this court at the March Term, 1876. May 13, 1876, the defendant filed a plea *puis darrein continuance*, setting forth that on the 8th May, 1876, George T. Hanford, who had been duly appointed receiver of the goods and effects of the defendant, had impleaded the plaintiff in the Supreme Court, in the State of New York, and recovered judgment against him for \$1,878.11, and costs, "which still remains in full force and effect, not in any wise reversed, annulled, discharged, or satisfied." The plea sets forth the proceeding in the New York suit, showing that the plaintiff therein pleaded in set-off the matters involved in this case, and

¹ So of an interlocutory decree. *Board of Public Works v. Columbia College*, 17 Wall. 521; *Baugh v. Baugh*, 4 Bibb. 556. See *Griggs v. Becker*, 87 Wis. 313, 58 N. W. 396.

avers that the cause of action and the issue raised by the pleadings are the same in both suits, and that the parties are identical. To this plea the plaintiff demurs, assigning four causes of demurrer.

The first cause is, that the suit set forth in the plea is not alleged to have been instituted before the commencement of the present suit. And in his brief, the counsel for the plaintiff contends that there is no precedent for such a plea where the judgment was recovered by the defendant, or was recovered in a suit commenced subsequently to the suit in which it was pleaded.

We do not see that it makes any difference which party has recovered judgment. The true question is, whether the controversy has been determined by a competent tribunal having jurisdiction; for, if it has been, the defendant has the right to insist that it shall not be further prosecuted, unless for some technical reason he cannot have the benefit of the estoppel. The plaintiff says he cannot have the benefit of the estoppel because the suit in this State was first commenced. Is this so? We think not. The defendant had the right to sue the plaintiff in New York, notwithstanding the plaintiff had sued him in Rhode Island. The plaintiff, in defending against the New York suit, put in issue the same controversy which was in issue in the Rhode Island suit, and it was decided against him. Why should he not be concluded, and, if concluded, why should not the defendant have the benefit of the conclusion by plea *puis darrein*? If the judgment in New York had been recovered before the suit in Rhode Island, the defendant would certainly have been entitled to plead it. Indeed, such a judgment would be pleadable in bar if recovered in a foreign country, and *a fortiori*, under the Federal Constitution and law, when recovered in a sister State. *Ricardo v. Garcias*, 12 Cl. & Fin. 368; *Bissell v. Brigg*, 9 Mass. 462; *Mills v. Duryee*, 7 Cranch, 481; 2 Am. Lead. Cas. (5th ed.) 611 *et seq.*, where this subject is discussed, and the cases fully cited.

The two cases of *Baxley v. Linah*, 16 Pa. St. 241, and *North Bank v. Brown*, 50 Me. 214, are closely in point. In *Baxley v. Linah*, 16 Pa. St. 241, an action was commenced in Maryland, December 30, 1846, and in Pennsylvania, for the same cause, June 2, 1847. The defendant pleaded the prior pendency of the Maryland action in abatement to the Pennsylvania action, and the plea was overruled, the plea of prior pendency being available only when both actions are pending in the same State. *Bowne et al. v. Joy*, 9 Johns. Rep. 221; *Walsh et al. v. Durkin*, 12 Johns. Rep. 99. Subsequently, January 31, 1848, the plaintiff recovered judgment against the defendant in the Maryland action; and December 5, 1849, the defendant pleaded it in bar *puis darrein continuance*. The plaintiff demurred. The court, however, sustained the plea.

The only material difference between that case and the case at bar is, that there the judgment was recovered first in the earlier case, here in the later. But the judgment, whenever recovered, is still a judg-

ment; and why, then, is it not pleadable as such? In *North Bank v. Brown*, 50 Me. 214, the plaintiff commenced suit against the defendant in Maine, January 11, 1858; and in New York for the same cause, January 21, 1858. Judgment was first obtained in the New York suit, and it was held to be a good defence to the suit in Maine. Here the judgment does not appear to have been specially pleaded; but if it had been specially pleaded, we see no reason why the decision would not have been the same. We think the first cause of demurrer is not sufficient.¹

The second cause is, that it does not appear that the New York suit was prosecuted by or for the defendant corporation, or by its authority, or for its benefit.

The plea sets forth that the New York suit was prosecuted by George T. Hanford, as receiver of the goods and effects of the defendant, and avers that the parties are identical; meaning, doubtless, that they are in legal effect the same. We infer from this that, under the laws of New York, the receiver, for the purposes of his appointment, is virtually the corporation, and that therefore a suit by him as receiver is, in legal effect, a suit by the corporation. We the more readily infer that the law is so in New York, because it is so in this State. We think, when the judgment of a sister State is pleaded, we ought not to be too strict or technical; but that we ought to administer the law in a spirit of liberal comity, and to allow the plea every fair intendment, so as not to defeat the constitutional privilege of the judgment. If this suit were pending in New York such a judgment would doubtless be a bar to it. We think, therefore, that the second cause of demurrer cannot be sustained.

The third cause of demurrer is substantially the same as the second, and is for the same reason overruled.

The fourth cause is, that the cause of action in the two suits does not appear to be identical. The plea avers that it is identical, and we do not find, from an examination of the judgment as pleaded, any sufficient reason to think it is not so. See *Ricardo v. Garcias*, 12 Cl. & Fin. 368, 401.

The plaintiff states in his brief that an appeal has been taken from the judgment rendered in New York. The plea, however, does not show this. *Prima facie* the judgment as pleaded appears to be final and conclusive. Upon demurrer, we can only know what the plea discloses. If the plaintiff desires us to decide upon the effect of the appeal, he should bring the fact of the appeal before us by proper pleading and proof.

Upon the question whether the court can take cognizance of the

¹ *Acc. Cox v. Mitchell*, 7 C. B. N. s. 55; *Memphis & C. R. R. v. Grayson*, 88 Ala. 572, 7 So. 122; *Seevers v. Clement*, 28 Md. 426; *Whiting v. Burger*, 78 Me. 287; *Lane v. Hanson*, 25 Can. 69. See the *Santissima Trinidad*, 7 Wheat. 283, 355; *Lyman v. Brown*, 2 Curt. 559; *Thorpe v. Sampson*, 84 Fed. 63. — Edn.

New York law as to the effect of an appeal, unless pleaded and proved, see 2 Am. Lead. Cas. (5th ed.) 648 *et seq.*

Demurrer overruled.

After the foregoing opinion, the plaintiff replied to the plea *puis darrein continuance*: —

1. That the judgment of the Supreme Court of New York set forth in the plea had been appealed from, and that the suit wherein judgment had been given was consequently pending in the Supreme Court of New York.

2. That the receiver Hanford acted without authority, and did not institute the New York suit in behalf of the defendant corporation but for himself.

3. That the cause of action in the New York suit was not that in the present case.

All these replications concluded to the country. The defendant demurred to them all.

DURFEE, C. J. This is an action of assumpsit to which the defendant pleads in bar a former judgment recovered in the Supreme Court of the State of New York. The plaintiff replies that the judgment has been appealed from by him, and the suit is still pending in the court. The defendant demurs to the replication.

The defendant contends that by the law of New York an appeal does not vacate the judgment appealed from, but leaves it, until annulled or reversed, conclusive upon the parties.

Two questions arise upon the demurrers: —

1. The first question is, whether we can take judicial cognizance of the law of New York, or must presume it to be the same as ours until it is shown by averment and proof to be different. The decisions upon this point are conflicting, but we think the decision of the Supreme Court of Pennsylvania, in *The State of Ohio v. Hinchman*, 27 Pa. St. 479, rests upon the better reason. The court there held that, when the judgment impealed is the judgment of a sister State, the court will notice *ex officio* the law of the State in which it was rendered. The reason given for this is, that, in such a case, the court acts under the Constitution and laws of the United States, which require that the judgment shall have in every State the same faith and credit which it has in the State where it was originally rendered. In such a case, it was said, the decision of the State court is reëxaminable in the Supreme Court of the United States, which will, without averment or proof, take cognizance of the law of the State in which the record originates. "It would be a very imperfect and discordant administration," it was further said, "for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows, that in questions of this sort we should take notice of the local laws of a sister State in the same manner the Supreme Court of the United States would do on a writ of error to our judgment." See also

Baxley v. Linah, 16 Pa. St. 241; *Rae v. Hulbert*, 17 Ill. 572, 578; *Butcher v. The Bank of Brownsville*, 2 Kans. 70; 2 Am. Lead. Cas. 648 *et seq.* We think the reasoning is sound, and that it is not satisfactorily met by courts which adopt a different view. *Rape v. Heaton*, 9 Wis. 328, 341.

2. The second question relates to the conclusiveness of the judgment. We find, as claimed by the defendant, that by the law of New York an appeal, though it may stay the execution when proper security is given, does not affect the conclusiveness of the judgment so long as it remains unreversed. A judgment so appealed from is a valid bar to an action involving the same controversy. *Sage v. Harpending*, 49 Barb. S. C. 166; *Harris v. Hammond*, 18 How. Pr. 123; *Rathbone v. Morris*, 9 Ab. Pr. 213; *Freeman on Judgments*, § 328. If the judgment would be a good bar to this action in New York, it is entitled to have the same effect in this State. *Mills v. Duryee*, 7 Cranch, 481; *McElmoyle v. Cohen*, 13 Pet. 312; *Jacquette v. Hugunon*, 2 McLean, 129. The case of *Bank of North America v. Wheeler*, 28 Conn. 433, is a case exactly in point. After the commencement of that case in Connecticut, a judgment was recovered for the same cause of action in New York, and it was held that the judgment, notwithstanding it had been appealed from, was a good bar to the suit in Connecticut; it being found that, by the law of New York, the appeal operated only as a proceeding in error and did not vacate the judgment. We think, therefore, that the demurrer to the first replication must be sustained.

We will add, however, as matter of practice, that we think the pendency of the appeal in New York may be good ground for delaying judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time.

There are two other replications which are demurred to; but we think they raise issues of fact, which the plaintiff is entitled to have tried. The demurrers to them are, therefore, overruled.¹

A. v. H.

REICHSGERICHT. 1886.

[*Reported 16 Entscheidungen des Reichsgerichts, Civilsachen, 427.*]

THE defendants, as acceptors of several bills of exchange drawn and payable at Vienna, had been subjected by the Commercial Court of

¹ *Acc. Scott v. Pilkington*, 2 B. & S. 11; *Taylor v. Shew*, 39 Cal. 536; *Bank of North America v. Wheeler*, 28 Conn. 433; *Tompkins v. Cooper*, 97 Ga. 631, 25 S. E. 247; *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Faber v. Hovey*, 117 Mass. 107; *Loneragan v. Loneragan*, 55 Neb. 641, 76 N. W. 16; *Merchants' Ins. Co. v. DeWolf*, 33 Pa. 45; *Piedmont & A. L. Ins. Co. v. Ray*, 75 Va. 821; *Ferand v. Dreyfus* (Naples), 1 Ann. Giur. Ital. 1, 120. See *Heckling v. Allen*, 15 Fed. 196. — Ed.

Vienna at the suit of St., the bearer of the bills, to an order to pay ("Zahlungsauftrag.") By this order he was enjoined to pay the amount of the bills, with interest and costs, within three days or suffer execution. The order to pay, not being served upon the defendants by reason of their absence, was served upon a curator appointed for them by the Commercial Court, and after notification in due form by the court it acquired executory force. On the basis of this act the plaintiff, as assignee of St., sued the defendants, now domiciled at Berlin, and demanded that the defendants should be adjudged to pay the amount of the order to pay, or in other words that that order should be declared executory.

THE COURT. The Court of Appeal attributes to the order to pay of the Commercial Court of Vienna, passed August 22, 1877, the quality of a binding judgment, finds that the requirements of the Code of Procedure, section 661, for declaring the judgment of a foreign court executory within the country are fulfilled, and therefore adjudges that the defendants pay the plaintiff's demand. The reasons for appeal are unsound in so far as they deny that the order to pay is executory according to section 661 of the Code of Procedure. In particular, the plaintiffs in error assert wrongly that it is not a binding judgment, but merely an *ex parte* direction. It is not here a question of the meaning and effect of such an order to pay according to the Austrian law (a question withdrawn from the examination of this court on appeal by section 511 of the Code of Procedure), but whether this order constitutes a judgment within the meaning of section 661 of the Code of Procedure, which is within the jurisdiction of this court. This question has been rightly decided by the Court of Appeal. By the word "judgments" in section 661 are doubtless meant such judicial decisions as put an end to a suit between parties on the basis of an ordinary or summary process which secures a hearing to both parties. It is not necessary that both parties should appear in the proceedings; judgments by default may also be declared executory, according to section 661, No. 4. Orders to pay such as that now in question are judgments in this sense. According to the Ordinance of the Austrian Minister of Justice of 1850 (Reichsgesetzbl. No. 5 a), in a suit upon a bill of exchange when the plaintiff produces the original of the bill and the accessorial documents, and there are no circumstances of suspicion, the court may on motion of the plaintiff order the debtor on the bill, without a hearing on the merits, to pay the amount of the bill with costs within three days, on penalty of execution according to commercial law (section 5); the debtor who has been ordered to pay in this way must within the space of three days from the notification of the order of court present to the court and support all his objections (section 7); if within three days he has not paid nor filed objections, the order to pay becomes of itself, by expiration of the period of delay and without further action of the court, binding, and is thenceforth executory. Although the order to pay, which is not in the form of a judgment but of a mere order indorsed or minuted upon the

motion (see Blaschke, *Der österr. Wechselprozess*, 2d ed., p. 57; von Caustein, *Lehrbuch des österr. civilprozesses*, vol. II. p. 466, 509), is in itself only an interlocutory order on motion of the plaintiff and without a previous opportunity to the defendant to be heard, and not a judgment in the sense of section 661 of the Code of Procedure, yet after the expiration of the delay of three days it acquires that character, since the conditional order to pay thereby becomes unconditional, and it is analogous to an ordinary judgment by default. This order to pay, as the Court of Appeal has found in accordance with the Austrian law, having become legally binding, the requirements of section 661, No. 1, have been satisfied.¹ . . .

SECTION II.

THE OBLIGATION OF A JUDGMENT.

GODARD v. GRAY.

COURT OF QUEEN'S BENCH. 1870.

[*Reported Law Reports*, 6 *Queen's Bench*, 139.]

BLACKBURN, J.² In this case the plaintiffs declare on a judgment of a French tribunal, averred to have jurisdiction in that behalf.

The question arises on a demurrer to the second plea, which sets out the whole proceedings in the French court. By these it appears that the plaintiffs, who are Frenchmen, sued the defendants, who are Englishmen, on a charterparty made at Sunderland, which charterparty contained the following clause, "Penalty for non-performance of this agreement, estimated amount of freight." The French court below, treating this clause as fixing the amount of liquidated damages, gave judgment against the defendants for the amount of freight on two voyages. On appeal, the Superior Court reduced the amount to the estimated freight of one voyage, giving as their reason that the charterparty itself "*fixait l'indemnité à laquelle chacune des parties aurait droit pour inexécution de la convention par la faute de l'autre; que moyennant paiement de cette indemnité chacune des parties avait le droit de rompre la convention,*" and the tribunal proceeds to observe that the amount thus decreed was after all more than sufficient to cover all the plaintiffs' loss.

All parties in France seem to have taken it for granted that the words in the charterparty were to be understood in their natural sense; but the English law is accurately expressed in *Abbott on Shipping*, part 3, c. 1, s. 6, 5th ed., p. 170, and had that passage been brought

¹ The remainder of the judgment is omitted. — Ed.

² The statement of facts and arguments of counsel are omitted. — Ed.

to the notice of the French tribunal, it would have known that in an English charterparty, as is there stated, "Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause, he cannot, in effect, recover more than the damage actually sustained." But it was not brought to the notice of the French tribunal that according to the interpretation put by the English law on such a contract, a penal clause of this sort was in fact idle and inoperative. If it had been, they would, probably, have interpreted the English contract made in England according to the English construction. No blame can be imputed to foreign lawyers for not conjecturing that the clause was merely a *brutum fulmen*. The fault, if any, was in the defendants, for not properly instructing their French counsel on this point.

Still the fact remains that we can see on the face of the proceedings that the foreign tribunal has made a mistake on the construction of an English contract, which is a question of English law; and that, in consequence of that mistake, judgment has been given for an amount probably greater than, or, at all events, different from that for which it would have been given if the tribunal had been correctly informed what construction the English contract bore according to English law.

The question raised by the plea is, whether this is a bar to the action brought in England to enforce that judgment, and we are all of opinion that it is not, and that the plaintiff is entitled to judgment.

The following are the reasons of my Brother MELLOR and myself. My Brother HANNEN, though agreeing in the result, qualifies his assent to these reasons to some extent, which he will state for himself.

It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England and in those States which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams v. Jones*, 13 M. & W. 633: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced." And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the

jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may show that the judgment was obtained by the fraud of the plaintiff, for that would show that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the foreign court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him; but we prefer to imitate the caution of the present Lord Chancellor, in *Castrique v. Imrie*, Law Rep. 4 H. L. 445, and to leave those questions to be decided when they arise, only observing that in the present case, as in that, "the whole of the facts appear to have been inquired into by the French courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in France in deciding as they did decide."

There are a great many dicta and opinions of very eminent lawyers, tending to establish that the defendant in an action on a foreign judgment is at liberty to show that the judgment was founded on a mistake, and that the judgment is so far examinable. In *Houlditch v. Donegall*, 2 Cl. & F. 477, Lord Brougham goes so far as to say: "The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers; it is their decision that in this country a foreign judgment is only *prima facie*, not conclusive evidence of a debt." But there certainly is no case decided on such a principle; and the opinions on the other side of the question are at least as strong as those to which Lord Brougham refers.

Indeed, it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of pleading shows that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negating the existence of that original cause of action.

If, on the other hand, there is a *prima facie* obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal.

But we think it unnecessary to discuss this point, as the decisions of the Court of Queen's Bench in *Bank of Australasia v. Nias*, 16 Q. B. 717; 20 L. J. (C. P.) 284, of the Court of Common Pleas in *Bank of Australasia v. Harding*, 9 C. B. 661, 19 L. J. (C. P.) 345, and of the Court of Exchequer in *De Cosse Brissac v. Rathbone*, 6 H. & N. 301, 30 L. J. (Ex.) 238, seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law.

But there still remains a question which has never, so far as we know, been expressly decided in any court.

It is broadly laid down, by the very learned author of Smith's Leading Cases, in the original note to *Doe v. Oliver*, 2 Sm. L. C. 2d ed. 448, that "it is clear that if the judgment appear on the face of the proceedings to be founded on a mistaken notion of the English law," it would not be conclusive. For this he cites *Novelli v. Rossi*, 2 B. & Ad. 757, which does not decide that point, and no other authority; but the great learning and general accuracy of the writer makes his unsupported opinion an authority of weight; and accordingly it has been treated with respect. In *Scott v. Pilkington*, 2 B. & S. 42; 31 L. J. (Q. B.) 89, the court expressly declined to give any opinion on the point not then raised before them. But we cannot find that it has been acted upon; and it is worthy of note that the present very learned editors of Smith's Leading Cases have very materially qualified his position, and state it thus, if the judgment "be founded on an incorrect view of the English law, knowingly or perversely acted on;" the doctrine thus qualified does not apply to the present case, and there is, therefore, no need to inquire how far it is accurate.

But the doctrine as laid down by Mr. Smith does apply here; and we must express an opinion on it, and we think it cannot be supported, and that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact.

It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law, and any other mistake. No doubt the English court can, without arrogance, say that where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had arisen as to the law of some of the numerous por-

tions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be more likely to be right than the English court; if inquiring into the law of Scotland it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland the chances as to which court was right would be altered. Yet it surely cannot be said that a judgment shown to have proceeded on a mistaken view of Scotch law could be enforced in England and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland but not in England.

If, indeed, foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to inquire whether the foreign court had made a mistake, or to allow the defendant to assert that it had, yet that if the foreign court itself admitted its blunder they would not then act: but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defence which shows that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can show did exist.

The whole law was much considered and discussed in *Castrique v. Imrie*, Law Rep. 4 H. L. 414, 448, where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship. The decision of the House of Lords was, that the defendant's title derived under that sale was good, notwithstanding that mistake: Lord Colonsay pithily saying, "It appears to me that we cannot enter into an inquiry as to whether the French courts proceeded correctly, either as to their own course of procedure or their own law, nor whether under the circumstances they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is, whether under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship."

The question in *Castrique v. Imrie*, Law Rep. 4 H. L. 414, was as to the effect on the property of a judgment ordering a ship, locally situate in France, to be sold, and therefore was not the same as the question in this case as to what effect is to be given to a judgment against

the person. But at least the decision in *Castrique v. Imrie*, *supra*, establishes this, that a mistake as to English law on the part of a foreign tribunal does not operate in all cases so as to prevent the courts of this country from giving effect to the judgment.

In the course of the arguments in that case the point now under consideration was raised. In the opinion I delivered at the bar of the House, Law Rep. 4 H. L. 434-435, the cases which are commonly referred to as authorities for the opinion expressed by Mr. Smith in his note to *Doe v. Oliver*, 2 Sm. L. C. 2d ed. 448, are referred to. We have nothing to add to what is there said. And in the case of *Novelli v. Rossi*, 2 B. & Ad. 757, it will be found on perusing the judgment of Lord Tenterden that it does not contain one word in support of the doctrine for which it is cited. We think that case was rightly decided for the reasons given in *Castrique v. Imrie*, Law Rep. 4 H. L. 435; but at all events it does not bear out Mr. Smith's position.

For these reasons we have come to the conclusion that judgment should be given for the plaintiffs.

HANNEN, J. I agree that our judgment should be for the plaintiffs in this case, but as I do not entirely concur in the reasoning by which my Brothers BLACKBURN and MELLOR have arrived at that conclusion, I desire shortly to explain the ground on which my judgment is founded.

I think that the authorities oblige us (not sitting in a court of error) to hold that the defendants, by appearing in the suit in France, submitted to the jurisdiction of the French tribunal, and thereby created a *prima facie* duty on their part to obey its decision; but I do not think that any authority binds us, nor am I prepared to decide that a defendant, not guilty of any laches, against whom a foreign judgment *in personam* has been given, is precluded from impeaching it on the ground that it appears on the face of the proceedings to be based on an incorrect view of the English law, even though there may be evidence that the foreign court, knowingly or perversely, refused to recognize that law.

I do not, however, enter at length upon the consideration of this question, because I have arrived at the conclusion that the defendants in this case were guilty of laches. It does not appear upon the face of the proceedings, nor at all, that the French court was informed of what the English law was. It was the duty of the defendants to bring to the knowledge of the French court the provision of the English law on which they now for the first time rely, and having failed to do so, they must submit to the consequences of their own negligence. The French courts, like our own, can only be informed of foreign law by appropriate evidence, and the party who fails to produce it cannot afterwards impeach the judgment obtained against him on account of an error into which the foreign court has fallen presumably in consequence of his own default. Suitors in our own courts, in similar circumstances, must suffer a like penalty for their negligence. A defendant who has omitted to produce evidence which was procurable at the trial of a cause

cannot have a rehearing on that account; and in an action on a judgment of one of our own courts, we do not permit the defendant to plead any facts which might have been pleaded in the original action. These instances offer analogies by which I think the present case is governed, and on this ground I am of opinion that the defendants are precluded from impeaching the decision of the French tribunal, and that our judgment should be for the plaintiffs.

*Judgment for the plaintiffs.*¹

PEMBERTON v. HUGHES.

COURT OF APPEAL. 1899.

[*Reported Law Reports*, [1899] 1 *Chancery*, 781.]

THIS was an action brought by Mrs. "Sarah Elizabeth Pemberton," who claimed to be the widow of Francis Alexander Richard Pemberton, deceased, asking for a declaration that under a deed-poll executed by him on April 15, 1891, she was entitled to a jointure or rent-charge of £200 per annum issuing out of certain estates in Cambridgeshire devised by the will of one Christopher Pemberton, who died in 1850, to Francis A. R. Pemberton for life with remainder to his first and other sons in tail. On December 20, 1890, the plaintiff went through the ceremony of marriage with F. A. R. Pemberton, then the tenant for

¹ So where a judgment has been obtained, the right being merged in the judgment, no suit can be maintained on the original cause even in another State. *Henderson v. Staniford*, 105 Mass. 504. See *Suydam v. Barber*, 18 N. Y. 468.

The doctrine of the principal case is held in most jurisdictions to-day. *Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714; *Baker v. Palmer*, 83 Ill. 568; *Howland v. C. R. I. & P. R. R.*, 134 Mo. 474, 36 S. W. 29; *Dunstan v. Higgins*, 138 N. Y. 70, 33 N. E. 729. In a few States, however, the old notion that a foreign judgment is *prima facie* evidence of a claim and nothing more, appears still to prevail. *Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158; *Taylor v. Barron*, 30 N. H. 78.

A nonsuit, or any judgment not on the merits, does not create an obligation recognized in another State. *Homer v. Brown*, 16 How. 354; *Hallum v. Dickinson*, 47 Ark. 120; *Rankin v. Barnes*, 5 Bush, 20; *Haws v. Tiernan*, 53 Pa. 192; *Thoms v. King*, 95 Tenn. 60, 31 S. W. 983.

A judgment which has become unenforceable where rendered, in any form of proceeding, because of lapse of time cannot furnish a cause of action in another State. *Chapman v. Chapman*, 48 Kan. 636, 29 Pac. 1071; *St. Louis Type Foundry Co. v. Jackson*, 128 Mo. 119, 30 S. W. 521; *Brown v. Peples*, 10 Rich. Eq. 475; 8 Clunet, 169 (Austria, 30 Oct. '77).

Where by the local practice judgment in an action on a bond is pronounced for the penal sum, but execution issues only for the amount of damages found, it has been held that this may be sued on in another State, but as a judgment for the amount of damages only. *Batley v. Holbrook*, 11 Gray, 212. In *Dimick v. Brooks*, 21 Vt. 569, it was held that no action at all could be maintained in another State upon such a judgment.

—ED.

life in possession of the devised estates, and the above-mentioned deed-poll was subsequently executed by him in assumed exercise of a power given to him by a second codicil of the testator, whereby, after settling some further estates, the testator empowered every tenant for life who might be in possession of the settled estates under the limitations in his will and second codicil, either in contemplation of or after marriage, by deed "to appoint to or in favor of any woman whom he should marry or have married a yearly rent-charge of £200 or not exceeding that sum, to be issuing out of his said estates or any part thereof, and to commence from the decease of such tenant for life," to be payable half-yearly during the life of such woman for her jointure and in bar of dower.

* Francis A. R. Pemberton died on August 2, 1892, without issue, whereupon the plaintiff claimed to be entitled to her jointure under the deed-poll. Her claim was however disputed by the defendants, persons who on F. A. R. Pemberton's death became entitled in possession to the settled estates. The dispute arose under the following circumstances :

In February, 1884, the plaintiff and one Holmes Erwin, who were both domiciled and resident in the State of Florida, were married in that country according to the laws thereof. On January 18, 1888, Erwin — he and the plaintiff being then in Florida — obtained from the Florida court a decree against the plaintiff for divorce on the ground of her violent and ungovernable temper. The plaintiff did not appear to the proceedings, so that they were unopposed.

At the date of the plaintiff's alleged marriage with Francis A. R. Pemberton, which took place in Florida, Erwin was still living and he had, since the divorce, married again; and what the defendants now contended was that the Florida divorce was invalid, because the rules of the Florida court required that "ten days" should "intervene" between the day on which process was issued, by writ of subpœna against the defendant, and the day on which it was "returnable" — called "terminal" days — and that in the present case only nine clear days, in fact, intervened between the day on which the writ of subpœna was issued and the day on which it was returnable. The defendants therefore alleged that at the time when the plaintiff went through the form of marriage with Pemberton she was still the wife of Erwin, and that consequently she was not the widow of Pemberton and not entitled to the jointure as such.

After considering the expert evidence — which was conflicting as to whether the day of service should be counted as one of the "ten" days — and the rules of the Florida court, KEKEWITCH, J., came to the conclusion that the evidence adduced on behalf of the defendants must prevail, and that "intervening" days meant "clear" days, so that the "terminal" days must be excluded from the computation. He also came to the conclusion that this defect in procedure went to the root of the jurisdiction of the Florida court and was fatal to the validity of

the divorce. He accordingly held that the plaintiff's case failed, and dismissed the action with costs.

The plaintiff appealed.¹

LINDLEY, M. R., after stating the facts, and pointing out that the decree for divorce had been made by a court having jurisdiction in Florida to pronounce divorces between persons domiciled and resident in Florida, and had never been set aside or reversed, and now stood as a final and subsisting decree, proceeded: — . . .

Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.

There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction in the sense above explained—*i. e.*, over the subject-matter or over the persons brought before them. *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Price v. Dewhurst* (1838), 4 My. & Cr. 76; *Buchanan v. Rucker*, 9 East, 192; *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670. But the jurisdiction which alone is important in these matters is the competence of the court in an international sense—*i. e.*, its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country. This is pointed out by Mr. Westlake (*International Law*, 3d ed. § 328) and by Foote (*Private International Jurisprudence*, 2d ed. 547), and is illustrated by *Vanquelin v. Bouard*, 15 C. B. (N. S.) 341. That was an action on a judgment obtained in France on a bill of ex-

¹ Part of the statement of facts, the arguments of counsel, part of the opinion of LINDLEY, M. R., in which he considered the evidence as to the law of Florida, and the concurring opinions of RIGBY and VAUGHAN WILLIAMS, L. J.J., are omitted.—ED.

change. The court was competent to try such actions, and the defendant was within its jurisdiction. He let judgment go by default, and in the action in this country on the judgment he pleaded that by French law the French court had no jurisdiction, because the defendant was not a trader and was not resident in a particular town where the cause of action arose. In other words, the defendant pleaded that the French action was brought in the wrong court (see the 13th plea). The Court of Common Pleas held the plea bad, and that the defence set up by it should have been raised in the French action. The French action in *Vanquelin v. Bouard*, *supra*, was an action *in personam*, and the parties to the action in France were also the parties to the action brought in this country on the French judgment. The decision, therefore, does not exactly cover the present case, but it goes far to show that the defendants' contention in this case cannot be supported.

The defendants' contention entirely ignores the distinction between the jurisdiction of tribunals from an international and their jurisdiction from a purely municipal point of view. But that distinction rests on good sense, and is recognized by modern writers on private international law; (see Westlake and Foote (*ubi sup.*) and Piggott on Foreign Judgments, 2d ed. p. 129 *et seq.* He says (p. 130): "The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit."

Wharton's Conflict of Laws § 792 *et seq.*, contains a careful review of the question by a learned American lawyer, and brings out the distinction very clearly: see sections 801, 812. In section 812 he says: "The true test seems to be, competency according to the rules of international law:" and it is plain that these do not include mere rules of procedure.

In Dicey's Conflict of Laws there are some valuable chapters — xi. p. 361, and xvi. p. 400 — on the jurisdiction of foreign courts; and in them will be found various meanings of the expression, "court of competent jurisdiction." These various meanings show the danger of using that expression without taking care to avoid the confusion to which they otherwise give rise.

It may be safely said that, in the opinion of writers on international law, and for international purposes, the jurisdiction or the competency of a court does not depend upon the exact observance of its own rules of procedure. The defendants' contention is based upon the assumption that an irregularity in procedure of a foreign court of competent jurisdiction in the sense above explained is a matter which the courts of this country are bound to recognize if such irregularity involves nullity of sentence. No authority can be found for any such proposition; and, although I am not aware of any English decision exactly to the contrary, there are many which are so inconsistent with it as to show that it cannot be accepted.

A judgment of a foreign court having jurisdiction over the parties and subject-matter — *i. e.*, having jurisdiction to summon the defend-

ants before it and to decide such matters as it has decided — cannot be impeached in this country on its merits. *Castrique v. Imrie*, L. R. 4 H. L. 414 (*in rem.*); *Godard v. Gray*, L. R. 6 Q. B. 139 (*in personam*); *Messina v. Petrococchino* (1872), L. R. 4 P. C. 144 (*in personam*). It is quite inconsistent with those cases, and also with *Vanquelin v. Bouard*, *supra*, to hold that such a judgment can be impeached here for a mere error in procedure. And in *Castrique v. Imrie*, *supra*, Lord Colonsay said, L. R. 4 H. L. 448, that no inquiry on such a matter should be made.

A decree for divorce, altering as it does the status of the parties and affecting, as it may do, the legitimacy of their after-born children, is much more like a judgment *in rem* than a judgment *in personam*; see *Niboyet v. Niboyet* (1878), 4 P. D. 1, 12. And where there are differences between the two, the decisions on foreign judgments *in rem* are better guides for the determination of this case than decisions of foreign judgments *in personam*. The leading cases on foreign judgments *in rem* are *Dogliani v. Crispin*, L. R. 1 H. L. 301; *Castrique v. Imrie*, *supra*; *In re Trufort*, 36 Ch. D. 600. There is nothing, however, in the decisions in these cases to assist the defendants. On the contrary, the judgments delivered in them are, in my opinion, adverse to the defendants' contention.

In *Dogliani v. Crispin*, *supra*, a Portuguese court decided that the respondent was the natural son of a deceased man domiciled in Portugal, and not a "noble," and that the respondent was consequently entitled to succeed to his father's personal estate. The appellant was a party to those proceedings, but she afterwards claimed the property in question under a will of the deceased. She was held precluded from disputing the Portuguese decree. Lord Cranworth distinctly stated (L. R. 1 H. L. 315), that the decision, having been pronounced by a court of competent jurisdiction, was one which English courts were "bound to receive without inquiry as to its conformity or non-conformity with the laws of the country where it was pronounced;" and a little lower Lord Cranworth stated that, in his opinion, evidence to show that the decision was not in accordance with Portuguese law ought not to have been received. Lord Cranworth's judgment did not, as I understand it, turn on the fact that the appellant was personally estopped from disputing the Portuguese judgment because she was a party to the proceedings in Portugal; his decision was based on the competence of the court and the nature of the controversy before it. It is necessary, however, to bear in mind that undefended proceedings for divorce require to be very narrowly scrutinized, for such divorces may be easily connived at. It is unnecessary to consider whether an English court would recognize a foreign divorce proved to have been obtained by collusion, even if the parties divorced were foreigners domiciled and resident within the jurisdiction of the foreign court. No collusion is relied upon or proved in the present case. If, therefore, the principles above explained are correct, I see no ground on which

an English court can refuse to recognize the validity of the divorce in question in this case, unless it be on one or other of the two following grounds: namely, (1) that a foreign divorce decree pronounced in an undefended action will never be recognized in this country; or (2) that the courts of this country will not recognize any divorce even of foreigners for any causes other than those for which a divorce can be obtained in this country. To lay down now for the first time either of these doctrines is, in my judgment, quite impossible, nor were they alluded to by counsel. I thought it, however, desirable to mention them, in order that it might not be supposed that they had been overlooked.

In the result the appeal must be allowed and the judgment reversed, and a declaration be made that the plaintiff is entitled to the £200 a year, with an account and order for payment. The defendants must pay the costs of the action and of the appeal.

HILTON v. GUYOT.

SUPREME COURT OF THE UNITED STATES. 1895.

[*Reported 159 United States, 113.*]

THE first of these two cases was an action at law, brought December 18, 1885, in the Circuit Court of the United States for the Southern District of New York, by Gustave Bertin Guyot, as official liquidator of the firm of Charles Fortin & Co., and by the surviving members of that firm, all aliens and citizens of the Republic of France, against Henry Hilton and William Libbey, citizens of the United States and of the State of New York, and trading as copartners, in the cities of New York and Paris and elsewhere, under the firm name of A. T. Stewart & Co. The action was upon a judgment recovered in a French court at Paris in the Republic of France by the firm of Charles Fortin & Co., all whose members were French citizens, against Hilton and Libbey, trading as copartners as aforesaid, and citizens of the United States and of the State of New York.

The answer of the defendants alleged that they appeared in the French court solely for the purpose of protecting their property there; that there were gross frauds in the accounts of Fortin & Co.; that the trial was not a fair one; that by the law of France if such a judgment had been obtained in the United States the merits of it would be re-examined in the French courts.

The defendants, on June 22, 1888, filed a bill in equity against the plaintiffs, setting forth the same matters as in their answer to the action at law, and praying for a discovery, and for an injunction against the prosecution of the action. To that bill a plea was filed, setting up the

French judgments; and upon a hearing the bill was dismissed. 42 Fed. Rep. 249. From the decree dismissing the bill an appeal was taken, which was the second case now before this court.

The action at law afterwards came on for trial by a jury. The court directed a verdict for the plaintiffs in the sum of \$277,775.44, being the amount of the French judgment and interest. The defendants, having duly excepted to the rulings and direction of the court, sued out a writ of error.

The writ of error in the action at law and the appeal in the suit in equity were argued together in this court in January, 1894, and by direction of the court were reargued in April, 1894.¹

GRAY, J.² In order to appreciate the weight of the various authorities cited at the bar, it is important to distinguish different kinds of judgments. Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction, proceedings, and notice will be assumed. It will also be assumed that they are untainted by fraud, the effect of which will be considered later.

A judgment *in rem*, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by Chief Justice Marshall: "The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of coördinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coördinate tribunal is capable of making the inquiry." *Williams v. Armroyd*, 7 Cranch, 423, 432. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law. *Croudson v. Leonard*, 4 Cranch, 434; *Williams v. Armroyd*, above cited; *Ludlow v. Dale*, 1 Johns. Cas. 16. But the same rule applies to judgments *in rem* under municipal law. *Hudson v. Guestier*, 4 Cranch, 293; *Ennis v. Smith*, 14 How. 400, 430; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 291; *Scott v. McNeal*, 154 U. S. 34, 46; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Monroe v. Douglas*, 4 Sandf. Ch. 126.

A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. *Cottington's case*,

¹ The statement of facts is abridged, and arguments of counsel are omitted. Part of the opinion of the court is omitted. — Ed.

² Part of the opinion is omitted. See the opinion at large for an exhaustive collection of authorities. — Ed.

2 Swans. 326; Roach v. Garvan, 1 Ves. Sen. 157; Harvey v. Farnie, 8 App. Cas. 43; Cheely v. Clayton, 110 U. S. 701. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1688, in Cottington's case, above cited, said: "It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences."

Other judgments, not strictly *in rem*, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached. Story on Conflict of Laws (2d ed.), § 592 *a*. And if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt in a suit by him to recover the amount upon the promise of indemnity. It was of such a judgment, and in such a suit, that Lord Nottingham said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here." Gold v. Canham (1689), 2 Swans. 325; s. c. 1 Cas. in Ch. 311. See also Tarleton v. Tarleton, 4 M. & S. 20; Konitzky v. Meyer, 49 N. Y. 571.

Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country between citizens or residents thereof. Story's Conflict of Laws, §§ 330-341; May v. Breed, 7 Cush. 15. Such was the case, cited at the bar, of Burroughs or Burrows v. Jamineau or Jemino, Mos. 1; s. c. 2 Stra. 733; 2 Eq. Cas. Ab. 525, pl. 7; 12 Vin. Ab. 87, pl. 9; Sel. Cas. in Ch. 69; 1 Dick. 48.

In that case, bills of exchange, drawn in London, were negotiated, indorsed, and accepted at Leghorn in Italy, by the law of which an acceptance became void if the drawer failed without leaving effects in the acceptor's hands. The acceptor, accordingly, having received advices that the drawer had failed before the acceptances, brought a suit at Leghorn against the last indorsees, to be discharged of his acceptances, paid the money into court and obtained a sentence there, by which the acceptances were vacated as against those indorsees and all the indorsers and negotiators of the bills, and the money deposited was returned to him. Being afterwards sued at law in England by subsequent holders of the bills, he applied to the Court of Chancery and obtained a perpetual injunction. Lord Chancellor King, as reported by Strange,

“was clearly of opinion that this cause was to be determined according to the local laws of the place where the bill was negotiated, and the plaintiff’s acceptance of the bill having been vacated and declared void by a court of competent jurisdiction, he thought that sentence was conclusive and bound the Court of Chancery here;” as reported in Viner, that “the court at Leghorn had jurisdiction of the thing, and of the persons;” and, as reported by Mosely, that, though “the last indorsees had the sole property of the bills, and were therefore made the only parties to the suit at Leghorn, yet the sentence made the acceptance void against the now defendants and all others.” It is doubtful, at the least, whether such a sentence was entitled to the effect given to it by Lord Chancellor King. See *Novelli v. Rossi*, 2 B. & Ad. 757; *Castrique v. Imrie*, L. R. 4 H. L. 414, 435; 2 Smith’s Lead. Cas. (2d ed.) 450.

The remark of Lord Hardwicke, *arguendo*, as Chief Justice, in *Boucher v. Lawson* (1734), that “the reason gone upon by Lord Chancellor King, in the case of *Burroughs v. Jamineau*, was certainly right, that where any court, whether foreign or domestic, that has the proper jurisdiction of the case, makes a determination, it is conclusive to all other courts,” evidently had reference, as the context shows, to judgments of a court having jurisdiction of the thing; and did not touch the effect of an executory judgment for a debt. Cas. temp. Hardw. 85, 89; s. c. *Cunningham*, 144, 148.

In former times, foreign decrees in admiralty *in personam* were executed, even by imprisonment of the defendant, by the Court of Admiralty in England, upon letters rogatory from the foreign sovereign, without a new suit. Its right to do so was recognized by the Court of King’s Bench in 1607 in a case of *habeas corpus*, cited by the plaintiffs, and reported as follows: “If a man of Frizeland sues an Englishman in Frizeland before the Governor there, and there recovers against him a certain sum; upon which the Englishman, not having sufficient to satisfy it, comes into England, upon which the Governor sends his letters massive into England, *omnes magistratus infra regnum Angliæ rogans*, to make execution of the said judgment. The Judge of the Admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law; for this is by the law of nations, that the justice of one nation should be aiding to the justice of another nation, and for one to execute the judgment of the other; and the law of England takes notice of this law, and the Judge of the Admiralty is the proper magistrate for this purpose; for he only hath the execution of the civil law within the realm. Pasch. 5 Jac. B. R., *Weir’s* case, resolved upon an *habeas corpus*, and remanded.” 1 Rol. Ab. 530, pl. 12; 6 Vin. Ab. 512, pl. 12. But the only question there raised or decided was of the power of the English Court of Admiralty, and not of the conclusiveness of the foreign sentence; and in later times the mode of enforcing a foreign decree in admiralty is by a new libel. See *The City of Mecca*, 5 P. D. 28, and 6 P. D. 106.

The extraterritorial effect of judgments *in personam*, at law or in equity, may differ, according to the parties to the cause. A judgment of that kind between two citizens or residents of the country, and thereby subject to the jurisdiction, in which it is rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound. *Ricardo v. Garcias*, 12 Cl. & Fin. 368; *The Griefswald*, Swabey, 430, 435; *Barber v. Lamb*, 8 C. B. (N. S.) 95; *Lea v. Deakin*, 11 Biss. 23.

The effect to which a judgment, purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country — as is the case now before us — presents a more difficult question, upon which there has been some diversity of opinion.

Early in the last century, it was settled in England that a foreign judgment on a debt was considered not, like a judgment of a domestic court of record, as a record or a specialty, a lawful consideration for which was conclusively presumed; but as a simple contract only. . . .

In recent times, foreign judgments rendered within the dominions of the English Crown, and under the law of England, after a trial on the merits, and no want of jurisdiction, and no fraud or mistake, being shown or offered to be shown, have been treated as conclusive by the highest courts of New York, Maine, and Illinois. *Lazier v. Wescott* (1862), 26 N. Y. 146, 150; *Dunstan v. Higgins* (1893), 138 N. Y. 70, 74; *Rankin v. Goddard* (1866), 54 Me. 28, and (1868) 55 Me. 389; *Baker v. Palmer* (1876), 83 Ill. 568. In two early cases in Ohio, it was said that foreign judgments were conclusive, unless shown to have been obtained by fraud. *Silver Lake Bank v. Harding* (1832), 5 Ohio, 545, 547; *Anderson v. Anderson* (1837), 8 Ohio, 108, 110. But in a later case in that State it was said that they were only *prima facie* evidence of indebtedness. *Pelton v. Platner* (1844), 13 Ohio, 209, 217. In *Jones v. Jamison* (1860), 15 La. Ann. 35, the decision was only that, by virtue of the statutes of Louisiana, a foreign judgment merged the original cause of action as against the plaintiff. . . .

In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or

any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

But they have sought to impeach that judgment upon several other grounds, which require separate consideration.

It is objected that the appearance and litigation of the defendants in the French tribunals were not voluntary, but by legal compulsion, and therefore that the French courts never acquired such jurisdiction over the defendants, that they should be held bound by the judgment.

Upon the question what should be considered such a voluntary appearance, as to amount to a submission to the jurisdiction of a foreign court, there has been some difference of opinion in England. . . .

But it is now settled in England that, while an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance. *De Cosse Brissac v. Rathbone* (1860), 6 H. & N. 301; s. c. 20 Law Journal (N. S.), Exch. 238; *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155, 162; *Voinet v. Barrett* (1885), 1 Cab. & El. 554; s. c. 54 Law Journal (N. S.), Q. B. 521, and 55 Law Journal (N. S.), Q. B. 39.

The present case is not one of a person travelling through or casually found in a foreign country. The defendants, although they were not citizens or residents of France, but were citizens and residents of the State of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France. Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property, in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of those courts, from being taken in satisfaction of any judgment that might be recovered against them, would not, according to our law, show that those courts did not acquire jurisdiction of the persons of the defendants. . . .

It is now established in England by well considered and strongly reasoned decisions of the Court of Appeal, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.¹ . . .

¹ Citing *Abouloff v. Oppenheimer*, 10 Q. B. D. 295; *Vadala v. Lawes*, 25 Q. B. D. 310; *Crozat v. Brogden*, [1894] 2 Q. B. 30. — Ed.

But whether these decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries. . . .

There is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller States, — Norway, Portugal, Greece, Monaco, and Hayti, — the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being *prima facie* evidence of the justice of the claim. In the great majority of the countries on the continent of Europe, — in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary (perhaps in Italy), and in Spain, — as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

The prediction of Mr. Justice Story (in section 618 of his Commentaries on the Conflict of Laws, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as *prima facie* evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made,

it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the Colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to re-examination, either merely because it was a foreign judgment, or because judgments of that nation would be re-examinable in the courts of France.

For these reasons, in the action at law, the

Judgment is reversed, and the cause remanded to the Circuit Court with directions to set aside the verdict and to order a new trial.

For the same reasons, in the suit in equity between these parties, the foreign judgment is not a bar, and, therefore, the

Decree dismissing the bill is reversed, the plea adjudged bad, and the cause remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

Mr. Chief Justice FULLER, with whom concurred Mr. Justice HARLAN, Mr. Justice BREWER, and Mr. Justice JACKSON, dissenting.

Plaintiffs brought their action on a judgment recovered by them against the defendants in the courts of France, which courts had jurisdiction over person and subject-matter, and in respect of which judgment no fraud was alleged, except in particulars contested in and considered by the French courts. The question is whether under these circumstances, and in the absence of a treaty or act of Congress, the judgment is re-examinable upon the merits. This question I regard as one to be determined by the ordinary and settled rule in respect of allowing a party, who has had an opportunity to prove his case in a competent court, to retry it on the merits, and it seems to me that the doctrine of *res judicata* applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation.

This application of the doctrine is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law. The fundamental principle concerning judgments is that disputes are finally determined by them, and I am unable to perceive why a judgment *in personam* which is not open to question on the ground of want of jurisdiction, either intrin-

sically or over the parties, or of fraud, or on any other recognized ground of impeachment, should not be held *inter partes*, though recovered abroad, conclusive on the merits.

Judgments are executory while unpaid, but in this country execution is not given upon a foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose.

The principle that requires litigation to be treated as terminated by final judgment properly rendered, is as applicable to a judgment proceeded on in such an action, as to any other, and forbids the allowance to the judgment debtor of a retrial of the original cause of action, as of right, in disregard of the obligation to pay arising on the judgment and of the rights acquired by the judgment creditor thereby.

That any other conclusion is inadmissible is forcibly illustrated by the case in hand. Plaintiffs in error were trading copartners in Paris as well as in New York, and had a place of business in Paris at the time of these transactions and of the commencement of the suit against them in France. The subjects of the suit were commercial transactions, having their origin, and partly performed, in France under a contract there made, and alleged to be modified by the dealings of the parties there; and one of the claims against them was for goods sold to them there. They appeared generally in the case, without protest, and by counterclaims relating to the same general course of business, a part of them only connected with the claims against them, became actors in the suit and submitted to the courts their own claims for affirmative relief, as well as the claims against them. The courts were competent, and they took the chances of a decision in their favor. As traders in France they were under the protection of its laws and were bound by its laws, its commercial usages, and its rules of procedure. The fact that they were Americans and the opposite parties were citizens of France is immaterial, and there is no suggestion on the record that those courts proceeded on any other ground than that all litigants, whatever their nationality, were entitled to equal justice therein. If plaintiffs in error had succeeded in their cross suit and recovered judgment against defendants in error, and had sued them here on that judgment, defendants in error would not have been permitted to say that the judgment in France was not conclusive against them. As it was, defendants in error recovered, and I think plaintiffs in error are not entitled to try their fortune anew before the courts of this country on the same matters voluntarily submitted by them to the decision of the foreign tribunal. We are dealing with the judgment of a court of a civilized country, whose laws and system of justice recognize the general rules in respect to property and rights between man and man prevailing among all civilized peoples. Obviously the last persons who should be heard to complain are those who identified themselves with the business of that country, knowing that all their transactions there would be subject to the local laws and modes of doing business. The French courts appear to have acted "judicially, honestly, and

with the intention to arrive at the right conclusion ;” and a result thus reached ought not to be disturbed.

[The learned Chief Justice here recited extracts from the opinions in *Nouvion v. Freeman*, 15 App. Cas. 1, and *Godard v. Gray*, L. R. 6 Q. B. 139, and continued:]

In any aspect, it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now the rule is universal in this country that private rights acquired under the laws of foreign States will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the State where this is sought to be done ; and although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails to-day by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right.

And, without going into the refinements of the publicists on the subject, it appears to me that that law finds authoritative expression in the judgments of courts of competent jurisdiction over parties and subject-matter.

It is held by the majority of the court that defendants cannot be permitted to contest the validity and effect of this judgment on the general ground that it was erroneous in law or in fact ; and the special grounds relied on are *seriatim* rejected. In respect of the last of these, that of fraud, it is said that it is unnecessary in this case to decide whether certain decisions cited in regard to impeaching foreign judgments for fraud could be followed consistently with our own decisions as to impeaching domestic judgments for that reason, “because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France, and that ground is the want of reciprocity on the part of France as to the effect to be given to the judgments of this and other foreign countries.” And the conclusion is announced to be “that judgments rendered in France or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff’s claim.” In other words, that although no special ground exists for impeaching the original justice of a judgment, such as want of jurisdiction or fraud, the right to retry the merits of the original cause at large, defendant being put upon proving those merits, should be accorded in every suit on judgments recovered in countries where our own judgments are not given full effect, on that ground merely.

I cannot yield my assent to the proposition that because by legislation and judicial decision in France that effect is not there given to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered,

(subject, of course, to the recognized exceptions,) therefore we should pursue the same line of conduct as respects the judgments of French tribunals. The application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary.

As the court expressly abstains from deciding whether the judgment is impeachable on the ground of fraud, I refrain from any observations on that branch of the case.

Mr. Justice HARLAN, Mr. Justice BREWER, and Mr. Justice JACKSON concur in this dissent.

SADLER v. ROBINS.

NISI PRIUS, AND COURT OF KING'S BENCH. 1808.

[*Reported 1 Campbell, 253.*]

ASSUMPSIT on a decree of the high Court of Chancery in the island of Jamaica. The declaration stated, that on the 16th day of July, 1805, in a certain cause, wherein James Sadler and others were complainants, and James Robins and others, executors of John Sadler deceased, were defendants, it was by the said high Court of Chancery ordered, adjudged, and decreed, that the said James Robins and one R. Haywood, since deceased, should on or before the first day of January then next ensuing pay unto the said James Sadler, or his lawful attorney or attorneys in the said island, the sum of £3,670 1s. 9¼d. current money of the said Island, with interest thereon from the 31st day of December then last past, first deducting thereout the full costs of the said defendants expended in the said suit, the same to be taxed by George Howell, Esq., one of the masters of the said court; and also deducting thereout all and every further payment or payments which the said James Sadler and R. Haywood or either of them might, on or before the said 1st day of January, 1806, show to the satisfaction of the said George Howell that they or either of them had paid on account of their said testator's estate. The declaration having then stated a liability and promise in the words of the decree, and the amount of the sum to be paid in sterling money with interest, went on to aver that the said James Robins and R. Haywood did not nor did either of them on or before the 1st day of January, 1806, or at any subsequent time, cause the costs by the said defendants in the said cause in the said Court of Chancery expended in that suit to be taxed by the said George Howell, Esq., or by any other of the masters of the said Court of Chancery, but as well the said James Robins, and R. Haywood, in the lifetime of the said R. Haywood, as the said James Robins since the death of the said R. Haywood, have altogether neglected and refused

so to do, nor did the said James Robins, and R. Haywood, in the lifetime of the said R. Haywood, on or before the said first day of January, 1806, show to the satisfaction of the said George Howell, or any other master of the said court, that they or either of them had paid on account of the said testator's estate any sum or sums of money whatsoever: Breach, for non-payment of the said sum of £3,670 1s. 9½d. current money, with interest due thereon, as mentioned in the decree. Plea, *the general issue*.

The Attorney General having opened the plaintiff's case,

Lord ELLENBOROUGH expressed himself of opinion that the action was not maintainable; as it did not appear what sum was actually due to the plaintiff according to the terms of the decree.

The Attorney General contended that it lay upon the defendant to reduce the sum below that awarded to be paid on the first of January, 1806, and that if he took no steps for this purpose, the whole sum of £3,670 1s. 9½d. currency, became absolutely due on that day. It was impossible for the plaintiff either to tax the costs of the defendants in the suit, or to show what sums of money any of them has paid for their testator; and it was plain, from the words of the decree, that before any deduction was to be made by the plaintiff, the acts of taxing costs and proving payments were to be done by the opposite party.

Lord ELLENBOROUGH. "Deducting thereout the full costs of the said defendants" is the same as "the full costs of the said defendants first being deducted thereout;" and if the defendants did not appear to tax their costs, the plaintiff might have proceeded *ex parte*. At present, the sum due on the decree is quite indefinite. The operations to ascertain it should have taken place in the Court of Chancery in Jamaica, and cannot be gone through here at *nisi prius*. Had the decree been perfected, I would have given effect to it, as well as to a judgment at common law. The one may be the consideration for an assumpsit equally with the other.¹ But the law implies a promise to pay a definite, not an indefinite sum.

The Attorney General then urged strenuously, that the objection was upon the record, and that if it was well founded, judgment might be arrested.

Lord ELLENBOROUGH. If there is evidently no consideration to raise a promise, so that the action cannot be supported, why should the defendant be put to move in arrest of judgment? The plaintiff ought not to have brought his action here, while the decree was in an incomplete state. The case we had at the sittings after last term, *Buchanan v. Rucker*, 1 Camp. 63, shows with what facility these decrees and judgments in the West India islands are obtained; and they ought to be examined with some strictness before they are put in force in this country. In many other cases, when it is clear the action will not lie; although the objection appears on the record, and might be taken

¹ *Acc.* *Henderson v. Henderson*, 6 Q. B. 288; *Pennington v. Gibson*, 16 How. 65; *Meyer v. Brooks*, 29 Or. 203. — Ed.

advantage of by motion in arrest of judgment, or by writ of error, judges are in the habit of directing a nonsuit.

The plaintiff was then called.

The Attorney General in the following term obtained a rule to show cause why this nonsuit should not be set aside; but cause being shown, the judges were unanimously of opinion that it ought to stand.

LORD ELLENBOROUGH. There appears to be due to the plaintiff upon the decree a sum of money — *x*. Till the sum to be deducted is ascertained, it is impossible to say how much is really due. The plaintiff ought to have taxed the costs *ex parte*. There is no court where this proceeding is not allowed. At present no one can predicate how much the defendant is decreed to pay. The decree is therefore imperfect and cannot be the foundation of an assumpsit. As to the payments on account of the testator's estate, none being proved, it might be presumed that there were none; but there had certainly been costs expended in the suit, and until they are deducted according to the terms of the decree, an action cannot be maintained upon it.

GROSE, J. The plaintiff shows what sum is not due to him, not what sum is due.

LE BLANC, J. It is clear that the plaintiff is not entitled to the whole sum mentioned in the decree; and it was competent to him to have had the costs taxed at something however small.

BAYLEY, J. Of the same opinion.

*Rule discharged.*¹

CHRISTMAS v. RUSSELL.

SUPREME COURT OF THE UNITED STATES. 1867.

[*Reported 5 Wallace, 290.*]

CLIFFORD, J. Wilson, on the eleventh day of November, 1857, recovered judgment in one of the county courts in the State of Kentucky, against the plaintiff in error, for the sum of five thousand six hundred and thirty-four dollars and thirteen cents, which, on the thirty-first day of March, 1859, was affirmed in the Court of Appeals. Present record shows that the action in that case was assumpsit, and that it was founded upon a certain promissory note, signed by the defendant in that suit, and dated at Vicksburg, in the State of Mississippi, on the tenth day of March, 1840, and that it was payable at the Merchants' Bank, in New Orleans, and was duly indorsed to the plaintiff by the payee. Process was duly served upon the defendant, and he appeared in the case and pleaded to the declaration. Several defences were set up, but they were all finally overruled, and the verdict and judgment were for the plaintiff.

¹ *Acc. Whitaker v. Bramson, 2 Paine, 209.* So of an alternative judgment for a return or the payment of money. *Thorner v. Batory, 41 Md. 593.*—Ed.

On the fourth day of June, 1854, the prevailing party in that suit instituted the present suit in the court below, which was an action of debt on that judgment, as appears by the transcript. Defendant was duly served with process, and appeared and filed six pleas in answer to the action. Reference, however, need only be particularly made to the second and fourth, as they embody the material questions presented for decision. Substance and effect of the second plea were that the note, at the commencement of the suit in Kentucky, was barred by the statute of limitations of Mississippi, the defendant having been a domiciled citizen of that State when the cause of action accrued, and from that time to the commencement of the suit.

Fourth plea alleges that the judgment mentioned in the declaration was procured by the fraud of the plaintiff in that suit. Plaintiff demurred to these pleas, as well as to the fifth and sixth, and the court sustained the demurrers.¹ . . .

4. Cases may be found in which it is held that the judgment of a State court, when introduced as evidence in the tribunals of another State, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another State are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not foreign judgments under the Constitution and laws of Congress in any proper sense, because they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the State from whence" they were taken, nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the State where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments. *D'Arcy v. Ketchum et al.*, 11 How. 165; *Webster v. Reid*, 11 How. 437.

Subject to those qualifications, the judgment of a State court is conclusive in the courts of all the other States wherever the same matter is brought in controversy. Established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment. *Voorhees v. United States Bank*, 10 Pet. 449; *Huff v. Hutchinsonson*, 14 How. 588.

5. Exactly the same point was decided in the case of *Benton v. Burgot* (10 *Sergeant & Rawle*, 240) which, in all respects, was substantially like the present case. The action was debt on judgment

¹ Only so much of the opinion as discusses the demurrer to the fourth plea is given.
— Ed.

recovered in a court of another State, and the defendant appeared and pleaded *nil debet*, and that the judgment was obtained by fraud, imposition, and mistake, and without consideration. Plaintiff demurred to those pleas, and the court of original jurisdiction gave judgment for the defendant. Whereupon the plaintiff brought error, and the Supreme Court of the State, after full argument, reversed the judgment and directed judgment for the plaintiff. Domestic judgments, say the Supreme Court of Maine, even if fraudulently obtained, must nevertheless be considered as conclusive until reversed or set aside. *Granger v. Clark*, 22 Me. 130. Settled rule, also, in the Supreme Court of Ohio, is that the judgment of another State, rendered in a case in which the court had jurisdiction, has all the force in that State of a domestic judgment, and that the plea of fraud is not available as an answer to an action on the judgment. Express decision of the court is, that such a judgment can only be impeached by a direct proceeding in chancery. *Anderson v. Anderson*, 8 Ohio, 108.

Similar decisions have been made in the Supreme Court of Massachusetts, and it is there held that a party to a judgment cannot be permitted in equity, any more than at law, collaterally to impeach it on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered. *B. & W. Railroad v. Sparhawk*, 1 Allen, 448; *Homer v. Fish*, 1 Pick. 435. Whole current of decisions upon the subject in that State seems to recognize the principle that when a cause of action has been instituted in a proper forum, where all matters of defence were open to the party sued, the judgment is conclusive until reversed by a superior court having jurisdiction of the cause, or until the same is set aside by a direct proceeding in chancery. *McRae v. Mattoon*, 13 Pick. 57. State judgments, in courts of competent jurisdiction, are also held by the Supreme Court of Vermont to be conclusive as between the parties until the same are reversed or in some manner set aside and annulled. Strangers, say the court, may show that they were collusive or fraudulent; but they bind parties and privies. *Atkinsons v. Allen*, 12 Vt. 624.

Redfield, Ch. J., said in the case of *Hammond v. Wilder*, 23 Vt. 346, that there was no case in which the judgment of a court of record of general jurisdiction had been held void, unless for a defect of jurisdiction. Less uniformity exists in the reported decisions upon the subject in the courts of New York, but all those of recent date are to the same effect. Take, for example, the case of *Embury v. Conner*, 3 Coms. 522, and it is clear that the same doctrine is acknowledged and enforced. Indeed the court, in effect, say that the rule is undeniable that the judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. *Dobson v. Pearce*, 2 Kern. 165. Same rule prevails in the courts of New Hampshire,

Rhode Island, and Connecticut, and in most of the other States. *Holister v. Abbott*, 11 *Fost.* 448; *Rathbone v. Terry*, 1 *R. I.* 77; *Topp v. The Bank*, 2 *Swan*, 188; *Wall v. Wall*, 28 *Miss.* 413.

For these reasons our conclusion is, that the fourth plea of the defendant is bad upon general demurrer, and that there is no error in the record. The judgment of the Circuit Court is therefore,

*Affirmed with costs.*¹

ABERCROMBIE v. ABERCROMBIE.

SUPREME COURT OF KANSAS. 1902.

[*Reported 67 Pacific Reporter, 539.*]

GREENE, J.² The plaintiff and defendant were wife and husband. They separated, and the plaintiff took up her residence in El Paso County, Colo., where she brought suit for divorce, alimony, custody of their children, and attorney's fees. . . . The Colorado court had no jurisdiction of the defendant, unless it obtained such jurisdiction by reason of the defendant having filed in said court the stipulation to take depositions, together with the depositions so taken. On the 10th day of July the cause was called for trial. The court upon the application of plaintiff, appointed one R. L. Kennedy to appear for the defendant. Mr. Kennedy duly appeared in pursuance of such appointment. A trial was had, and judgment rendered for the plaintiff, granting her a decree of divorce, the care and custody of all the children, \$200 annually for each of said children until each arrived at the age of 21 years, \$2,000 for the support and maintenance of plaintiff, \$200 attorney's fees, and for costs of action. Plaintiff brought suit on a transcript of that judgment against the defendant in the District Court of Mitchell County,

¹ *Acc. Hanley v. Donoghue*, 116 U. S. 1, 4 (*semble*); *Ambler v. Whipple*, 139 Ill. 311, 23 N. E. 841; *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484; *McDonald v. Drew*, 64 N. H. 547, 15 Atl. 148; but see *Embry v. Palmer*, 107 U. S. 7, 11.

It is generally agreed that a plea that the judgment of another State of the Union was obtained by fraud does not state a good *legal* defence. *Peel v. January*, 35 Ark. 331; *Anderson v. Anderson*, 8 Oh. 108; *Wyoming Mfg. Co. v. Mohler*, (Pa.) 17 Atl. 31. *Contra, Warrington v. Ball*, 90 Fed. 465; *Coffee v. Neely*, 2 Heisk. 304.

But it is usually held that a bill will lie to enjoin an action upon a judgment fraudulently obtained in another State (at least where, as is usually the case, such a bill would lie in each State in case of a domestic judgment obtained by fraud). *Pearce v. Olney*, 20 Conn. 544; *Engel v. Scheuerman* 40 Ga. 206; *Dobson v. Pearce*, 12 N. Y. 156; *Babcock v. Marshall*, (Tex. Civ. App.) 50 S. W. 728; *Brown v. Parker*, 28 Wis. 21. And where an equitable plea may be set up in an action at law, it is usually held that an equitable plea that the judgment was obtained by fraud is a good bar to an action on the judgment of another State. *Rogers v. Gwinn*, 21 Ia. 58; *Ward v. Quinlin*, 57 Mo. 425; *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, 60 N. E. 663. And in a proceeding in equity the judgment may be impeached for fraud. *Davis v. Headley*, 22 N. J. Eq. 115. — ED.

² Part of the opinion is omitted. — ED.

Kan. The defendant answered, setting up — First, that the judgment rendered against him by the court in Colorado was without jurisdiction; and, second, that his appearance therein, if it should be held that the stipulation to take depositions was an appearance, was obtained by fraud and misrepresentations on the part of plaintiff. Upon the trial, judgment was rendered for the defendant below, and the plaintiff prosecuted error to this court. . . .

The defendant appeared in the Colorado court for the purpose of litigating and having determined one of the questions involved in that lawsuit. There is no conflict in the authorities that, where one appears in a case for any purpose other than to object to the jurisdiction of the court, he submits himself to that jurisdiction for all purposes of the action. The conduct, however, of the plaintiff in inducing and procuring the defendant to enter his appearance in said court is most reprehensible. The defendant entered into the agreement of settlement in good faith, and, as made, it was within the authority given by the plaintiff. He performed his agreement under the stipulation, so far as it was possible, up to the time the plaintiff repudiated it. When he entered into this stipulation it was understood that there was no unsettled question for determination by the Colorado court, except the custody of the boys. She induced him to believe this, and for this purpose, and no other, he was willing to submit himself to the jurisdiction of that court. When this stipulation had been secured and filed in that court, and after she had received a part of the consideration of the agreement, she repudiated the agreement, and then fraudulently uses this agreement to obtain a judgment for alimony. We have no hesitancy in saying that the defendant was induced by fraud and misrepresentations to enter such appearance in the Colorado court. It was as much fraud as if she had telegraphed or written him that one of their children was dangerously ill, for the purpose of inducing him to come to the State that she might secure service of summons upon him. Courts will not sanction such conduct, nor aid one in securing the fruits of an advantage thus fraudulently obtained. . . .

The jurisdiction of the Colorado court over the defendant having been obtained fraudulently by the plaintiff, it would be an anomaly in the law for this court to assist her in reaping the fruits of her fraudulent conduct. It has long been a rule of this court that where jurisdiction of a defendant has been obtained by fraud or wrong he may appear in the action, showing such fraud, and the court will always grant relief. If this is true, can there be any well-defined distinction between permitting him to appear in the original action to show the fraud, and in allowing him to set up such fraud in an action brought upon a judgment rendered in a case where jurisdiction of the defendant was obtained by fraud? Can a valid lawful act be accomplished by an unlawful means? . . .

The fact that the judgment sued on in this case is the judgment of a sister State can make no difference. It is only when jurisdiction is

admitted that full faith and credit should be given to the judgments of a sister State. That the judgment of a sister State may be attacked collaterally on the ground that jurisdiction was obtained fraudulently is supported by many authorities. In *Wood v. Wood*, 78 Ky. 624, 627, — an action upon a judgment in another State, where jurisdiction had been obtained fraudulently, — the court said: “The judgment, having been rendered by an inferior court, presumably without general jurisdiction, will be treated as a foreign judgment. . . . But whether it be treated as a foreign judgment or as a judgment of a court of general jurisdiction rendered in a sister State, and therefore coming within the constitutional provision and the act of Congress in regard to the faith and credit to be given such judgments, is immaterial, as it is now held both by the State and federal courts that judgments of either character may be collaterally attacked for want of jurisdiction of the subject-matter or of the person, regardless of recitals in the judgment or record. Whart. Conf. Laws, § 811; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Thompson v. Whitman*, 18 Wall. 457; and *Knowles v. Coke Co.*, 19 Wall. 59. It is now perfectly well settled that the judgment of a court without jurisdiction of both the subject-matter and of the person is absolutely void. It is, in legal effect, no judgment. No rights can be acquired under it, and no rights divested by it. Whenever such a judgment is relied upon for any purpose or in any way, the fact of the existence of jurisdiction may be inquired into. The only serious question that has arisen of late years upon this matter is as to whether the judgment could be collaterally inquired into, as to the jurisdiction of the person, when it recites on its face that there was service of process or personal appearance. But now even that question is practically at rest.” In *Dunlap v. Cody*, 31 Ia. 261, 262, 7 Am. Rep. 129, the chief justice says: “Do the means used to obtain jurisdiction of the person of defendant in the courts of Illinois amount to fraud? It would seem that this question scarcely needs discussion. Fraud consists in *suggestio falsi* or the *suppressio veri*. Both exist here. . . . An enlightened and just administration of the law, no less than sound public morals, condemns such practices, and demands that the client whose cupidity could sanction . . . such a purpose should . . . be disgraced. Does the fact that the jurisdiction of the person of the defendant was obtained by fraud constitute a defence to an action upon this judgment? It is the recognized law of this State that, when jurisdiction is properly acquired, fraud in the obtaining of a foreign judgment is a good defence to an action thereon. *Rogers v. Gwinn*, 21 Ia. 59, and cases cited. If, then, fraud may be shown to defeat a recovery upon a foreign judgment when the jurisdiction is undisputed, why should not fraud in obtaining the jurisdiction be followed by like consequences? . . . *Ex parte Wilson*, 1 Atk. 152. Referring to these authorities, Shaw, C. J., says: ‘These cases, therefore, seem to establish the general principle that a valid and lawful act cannot be accomplished by

any unlawful means, and whenever such unlawful means are resorted to the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights.' " In *Duringer v. Moschino*, 93 Ind. 495, subdivision 1 of the syllabus reads: "Where, by fraud, one induces another to go to another State in order to have service of process upon him, the latter can safely ignore the proceedings, and successfully resist a suit upon any judgment thus obtained."

It follows, therefore, that the judgment of the court below is correct, and must be affirmed. All the justices concurring.

BURNLEY v. STEVENSON.

SUPREME COURT OF OHIO. 1873.

[*Reported 24 Ohio State, 474.*]

MOTION for leave to file a petition in error to reverse the judgment of the District Court of Pickaway County.

The original action was brought in the Court of Common Pleas of Pickaway County, by the plaintiffs in error, to recover from the defendant in error the possession of two undivided third parts of 606 acres of land, situate in said county, and being part of original survey No. 6943, in the Virginia military district. The plaintiffs sought to recover in the right of the heirs of Gen. Charles Scott, to whom the land embraced in this survey had been conveyed by the United States by patent, in the year 1812.

The defendant, by way of defence, set up in his answer the following state of facts, to wit: That previous to the date of said patent, Gen. Charles Scott, having received a warrant for 1,666 $\frac{2}{3}$ acres of land, for military services rendered by him in the Virginia line in the continental establishment, had employed one John Evans, a surveyor, to locate, survey, and obtain patents for him, on said warrant, on lands in the Virginia military district, and in consideration of the services of Evans in the premises, had agreed to convey to him one-fifth part of all the lands so to be located, surveyed, and patented; that Evans duly performed said services; that the lands embraced in survey 6,943, were part of the lands located, surveyed and patented to Gen. Scott under said warrant; that it was further agreed between Scott and Evans, that the share of Evans under the contract should be selected from lands in said survey; that soon after the issuing of the patents to Scott, he died, without having conveyed to Evans the lands to which he was entitled under said contract.

That afterward Evans filed his bill in chancery, in the Circuit Court of Fayette County, Kentucky (the same being a court of general equity jurisdiction), against the heirs and legal representatives of said Scott

being the same persons under whom the plaintiffs claim title), to compel the specific performance of said contract, by a conveyance to him of the lands to which he was entitled thereunder; that said court obtained jurisdiction of the persons of all said heirs, by service of process and by voluntary appearance; that upon the final hearing of said cause upon the bill, answers, and exhibits, to wit on the 2d day of February, 1816, the court found the equity of the case in favor of Evans, and directed the defendants therein to convey to him the lands described in the petition of the plaintiffs below; that it was further decreed by said court, that in default of such conveyance by the defendants, one Robert Scott, a master commissioner of said court, should make such conveyance; and that afterward, in pursuance of said decree, said master commissioner, to wit, on the 28th of May, 1817, executed and delivered to said Evans a deed in fee-simple for said lands.

The defendant in his answer further sets forth, that he has succeeded to all the rights and title of said John Evans in and to said lands, and avers that he and those under whom he claims are now lawfully in possession thereof, and have so been in possession, claiming under said decree and the deed from said master, ever since the dates thereof.

To this defence the plaintiffs below filed their reply, to which the defendant demurred. The demurrer was sustained, to which ruling the plaintiffs excepted.

Judgment was therefore rendered in favor of the defendant below, which was afterward, on error, affirmed by the District Court.

To reverse these judgments, this proceeding is now instituted.

Plaintiffs in error admit that their reply in the court below was insufficient, if the above matters and things contained in the answer constituted a good defence to the action.¹

McILVAINE, J. The main proposition submitted in this case is whether, under and by virtue of the decree of the Circuit Court of Kentucky and the master's deed made in pursuance thereof, or of either of them, such an estate or right was vested in John Evans, as entitles the defendant, who has succeeded to all the rights of Evans, to the possession of the lands in controversy, as against the plaintiffs, whose claim of title is derived from the parties against whom the decree was rendered.

1. The jurisdiction of the Circuit Court to pronounce the decree, is the first inquiry involved in this proposition.

It appears from the record before us, that the Circuit Court of Kentucky which pronounced the decree, was a court of general equity jurisdiction; that some of the defendants in the cause were properly served with the process of the court, and that all others voluntarily appeared and submitted themselves to its jurisdiction, and that the subject-matter of the bill on which the decree was rendered, was the enforcement of a trust and the specific performance of a contract to convey lands situate in the State of Ohio.

¹ Arguments of counsel are omitted. — Ed.

That courts exercising chancery powers in one State have jurisdiction to enforce a trust, and to compel the specific performance of a contract in relation to lands situate in another State, after having obtained jurisdiction of the persons of those upon whom the obligation rests, is a doctrine fully settled by numerous decisions. *Penn v. Lord Baltimore*, 1 Ves. 444; *Massie v. Watts*, 6 Cranch, 148; *Penn v. Hayward*, 14 Ohio St. 302, and cases therein cited.

2. It does not follow, however, that a court having power to compel the parties before it to convey lands situated in another State, may make its own decree to operate as such conveyance. Indeed, it is well settled that the decree of such court cannot operate to transfer title to lands situate in a foreign jurisdiction. And this, for the reason that a judgment or decree *in rem* cannot operate beyond the limits of the jurisdiction or State wherein it is rendered. And if a decree in such case cannot effect the transfer of the title to such lands, it is clear that a deed executed by a master, under the direction of the court, can have no greater effect. *Watts v. Waddle et al.*, 6 Pet. 389; *Page v. McKee*, 3 W. P. D. Bush, 135. The master's deed to Evans must therefore be regarded as a nullity.

The next inquiry then is as to the force and effect of the decree rendered by the Circuit Court directing the heirs of Gen. Scott to convey the land in Ohio to Evans. This decree was *in personam*, and bound the consciences of those against whom it was rendered. In it, the contract of their ancestor to make the conveyance was merged. The fact that the title which had descended to them was held by them in trust for Evans was thus established by the decree of a court of competent jurisdiction. Such decree is record evidence of that fact, and also of the fact that it became and was their duty to convey the legal title to him. The performance of that duty might have been enforced against them in that court by attachment as for contempt; and the fact that the conveyance was not made in pursuance of the order, does not affect the validity of the decree in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment, the parties, and those holding under them with notice, are still bound thereby.

3. Under our code of practice, equitable as well as legal defences may be set up in an action for the recovery of land. The defendant in the court below set up this decree of the Circuit Court of Kentucky as a defence to the plaintiffs' action. That it did not constitute a good defence at law may be admitted, but we think, in equity, it was a sufficient defence.

The constitution of the United States declares that full faith and credit shall be given in each State to the records and judicial proceedings of every other State, and provides that Congress may prescribe the mode of proving such records and proceedings, and the effect thereof. By an act of May 26, 1790, Congress declared that the "records and judicial proceedings of the State courts," when properly

authenticated, "shall have the same faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the State from whence they are or shall be taken." When, therefore, a decree rendered by a court in a sister State, having jurisdiction of the parties and of the subject-matter, is offered as evidence, or pleaded as the foundation of a right, in any action in the courts of this State, it is entitled to the same force and effect which it had in the State where it was pronounced. *Mills v. Duryea*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; *McGilvray & Co. v. Avery*, 30 Vt. 538. That this decree had the effect in Kentucky of determining the equities of the parties to the land in this State, we have already shown; hence the courts of this State must accord to it the same effect. True, the courts of this State cannot enforce the performance of that decree by compelling the conveyance through its process of attachment; but when pleaded in our courts as a cause of action, or as a ground of defence, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud. See cases *supra*; also, *Davis v. Headley*, 22 N. J. Eq. 115; *Brown v. L. & D. R. R. Co.*, 2 Beas. (N. J. Eq.) 191; *Dobson v. Pearce*, 2 Kern. 156; *U. S. Bank v. Bank of Baltimore*, 7 Gill, 415.

Motion overruled.

BULLOCK v. BULLOCK.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1894.

[*Reported 52 New Jersey Equity*, 561.]

MAGIE, J.¹ The appellant in this cause was the complainant below. Her bill of complaint stated the following facts, viz., that she had commenced an action in the Supreme Court of the State of New York, which court had "jurisdiction in the case," against respondent, her former husband, for the purpose of dissolving the marriage previously entered into by them; that respondent was personally served with process and duly appeared in said action; that such proceedings were had thereon that a judgment was rendered in her favor, whereby it was adjudged that said marriage should be dissolved; that respondent should pay to her, as alimony, \$100 on the first day of each month, commencing June 1, 1892, and should execute a mortgage as security for such payments, upon lands in the State of New Jersey, of such form and containing such provisions as the court should subsequently direct and approve; that said court, by a subsequent order, directed respondent to execute, acknowledge, and deliver to appellant a mortgage of a specified form and containing specified provisions, upon lands in this

¹ Part of this opinion and part of the dissenting opinion, in which is discussed the jurisdiction of the New York court, are omitted. — Ed.

State which were particularly described in the order; that respondent had failed and refused to execute and deliver the mortgage as directed, and made various mortgages and conveyances of said lands without consideration and with the fraudulent purpose of defeating appellant's rights.

It was charged in the bill that appellant, by virtue of the decree and order of the New York court, acquired an equitable lien on said lands prior to the lien and interest of the mortgagees and grantees of respondent, and an equitable right to a mortgage on said lands in accordance with the decree and order.

Upon these statements and charges the prayers of the bill were for answer and discovery, for a decree setting aside the mortgages and conveyances of respondent, and that he be "decreed, pursuant to the said decree and order of the New York Supreme Court, to execute and deliver" to her "the mortgage on said premises therein directed to be made and delivered, according to the form therein provided." There was a general prayer for relief.

Respondent moved the Court of Chancery to dismiss the bill pursuant to the practice established by rule 215 of that court, upon the ground that the bill exhibited no equity entitling appellant to the relief she prayed for. The notice of the motion specifically set forth the grounds of objection.

The motion was heard by Vice-Chancellor Bird, and upon his advice a decree was made dismissing the bill. The opinion of the vice-chancellor is reported in 6 Dick. Ch. Rep. 444. From this decree appellant has prosecuted the appeal which is now to be decided. . . .

In my judgment it does not admit of doubt that the jurisdiction of the Supreme Court of New York, if properly averred in the bill, was a jurisdiction to make a decree as to alimony and its being secured by mortgage on lands in New Jersey only *in personam*, and to enforce it by any process against respondent which is proper in that State. Nor was the decree which was pronounced by that court capable of any other construction than one which shows it to have been within such conceded jurisdiction.

From these considerations I deem it evident that the theory of this bill that, by virtue of the decree and order of the Supreme Court of New York, appellant acquired an equitable lien on lands in New Jersey and a right to have such lands disposed in a certain manner, cannot be sustained without a disastrous violation of fundamental principles. The decree and order of that court does not pretend to have any such purpose or effect, nor could that court be empowered to make a decree having such an effect.

But it is ingeniously contended in this court that the decree and order of the Supreme Court of New York imposed upon respondent a personal obligation to do what that decree and order had directed him to do, and that a court of equity in New Jersey ought to compel him to perform that obligation as it would compel him to perform his con-

tract to convey or mortgage lands in its jurisdiction. Moreover, it is contended that the provisions of section 1 of article 4 of the Constitution of the United States, requiring full faith and credit to be given in each State to the records and judicial proceedings of every other State impart to this decree and order a conclusive force with respect to the mortgage directed to be given on lands here, which compels our courts to enforce it by degrees in conformity therewith.

Doubtless the judgment of the New York court must be accorded in our courts a conclusive effect in certain respects. Thus it has conclusively determined the status of the parties to that action, and that the marital relation previously existing between them has been absolutely dissolved. If, by the direction to pay alimony an indebtedness arises from time to time as such payments become due, an action at law would lie thereon, and the decree would furnish conclusive evidence of such indebtedness.

But the question, upon the solution of which this case must turn, is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answered in the affirmative, it seems evident that we accord jurisdiction over lands in New Jersey to the courts of other States, and, as was said by Chancellor Zabriskie, in *Davis v. Headley*, 22 N. J. Eq. 115, "leave to the courts of this State only the ministerial duty of executing their decrees." For the doctrine that jurisdiction respecting lands in a foreign State is not *in rem* but only *in personam* is bereft of all practical force if the decree *in personam* is conclusive and must be enforced by the courts of the situs.

If such is the effect which must be given to the judgments and decrees of the courts of a sister State respecting lands situated here, it is extraordinary that no trace of the doctrine can be found in text-books or in adjudicated decisions. My researches have not disclosed any support of the doctrine by any text-writer of repute or by any decision in point. The very industrious counsel who maintained this view in argument has produced no authority which, in my judgment, sustains his position. . . .

The contention that such an order requiring lands in New Jersey to be charged with alimony created a personal obligation on respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process or to make our decrees operate as process. Moreover, the substantial part of the decree is comprised in the dissolution of the marriage and the direction to pay alimony. The charge of the alimony upon lands is rather in the nature of process to enforce the substantial decretal order for alimony.

The establishment of the contrary doctrine would result in practically depriving a State of that exclusive control over immovable property therein which has always been accorded. For example, by our statutes, contracts respecting lands, to be enforceable, must be entered into and evidenced in a particular mode, but our courts, upon equitable grounds, sometimes enforce contracts that are without the statute. It is the province of our legislature to prescribe the rule for such contracts and for our courts to construe the rule so prescribed and to determine when such contracts, whether within or without the statute, may be enforced. It is true that the courts of another State, proceeding *in personam* to enforce a contract for lands in New Jersey, would be bound to determine whether the contract was enforceable under our laws. But they would construe those laws, and if their decree *in personam* may and must be conclusive in our courts and compel a decree in conformity therewith, it is obvious that the contract will be enforced according to whatever construction the foreign court put upon our laws, and not according to the construction of our own courts. Other examples will occur to any one considering the subject.

For these reasons I shall vote to affirm the decree below.

GARRISON, J. (concurring).

I concur in the result announced by Mr. Justice MAGIE, but not for the reasons contained in the opinion just read, nor for those stated in the conclusions of the learned equity judge who heard the cause in the Court of Chancery.

The object of the complainant's bill is to execute, through the medium of our Court of Chancery, an order made by the Supreme Court of New York upon the defendant to secure his performance of a decree rendered therein against him by mortgaging his lands in New Jersey. The procedure in this State is justified under that provision of the federal law that gives conclusive force in one State to the records and judicial proceedings of another. The vice of this deduction, in the case before us, is that it assumes that the order made by the New York court to secure the performance by the defendant of its decree against him is a "*judgment*" of that State within the meaning of the federal Constitution and the act of Congress.

The transcendent force given by the federal law to the judicial proceedings of sister States is confined to such judicial determinations as possess the quality of *judgment*; it does not extend to proceedings in the nature of execution or to orders merely ancillary to some special form of relief.

In cases that proceed to judgment in common-law form, this distinction is well marked, but it is liable to be lost sight of in decisions rendered in equity causes where judgment, in decretal form, is often accompanied by special orders for particular forms of relief or for the enforcement or securing of the execution of the decree pronounced. The distinction, however, is always a substantial one that

must not be overlooked because of the form in which the decretal order may be framed.

That only is *judgment* that is pronounced between the parties to the action upon the matters submitted to the court for decision. To judgments thus rendered, the federal law accords in every State the same conclusive force possessed in the State where they are rendered. After judgment in a State court, all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution or in aid of execution. No interpretation has ever been placed upon the federal Constitution giving conclusive effect, or, indeed, any effect at all to the executions of the judgments rendered in sister States or to any order merely in aid thereof. Such orders lack the quality of *judgment* and must be differentiated from judgments, even though embodied in the same decretal orders that pronounce the judgment of the court. These decretal orders may be defined to be decisions made touching some matter collateral to the issue presented in the record or required to be passed upon in order to carry into execution the judgment of the court. To these determinations ancillary to execution, no extraterritorial force is given by the federal law.

That the order in the present case touching the defendant's land in New Jersey is of this nature clearly appears in the case before us. Upon this demurrer it is established that the New York suit was instituted for the sole purpose of dissolving the marriage of the complainant with the defendant. Upon the record thus submitted the Supreme Court of New York pronounced as its judgment that the marriage should be dissolved with the incident of alimony to the complainant. Here the sentence of the law upon the record ceases. The order of the court then proceeds in these words: "And it is further adjudged and decreed that the said defendant, within ten days after the entry of this judgment and service thereof on the attorney for the defendant, execute and deliver unto the plaintiff a mortgage covering the real property owned by the defendant and particularly located in the State of New Jersey, which mortgage shall be of such form and contain such provisions as shall be sufficient and requisite to secure unto the plaintiff the faithful performance of the provisions of this judgment and decree on the part of the defendant as may be directed and approved by this court."

In my opinion this order was ancillary to execution and did not possess any element of a judgment upon the issue submitted to the court for decision, which was whether the marriage between the parties should be dissolved. For this reason I think the complainant's bill was properly dismissed.

VAN SYCKEL, J. (dissenting).

The Supreme Court of New York made a decree for divorce in favor of the wife, and ordered that the husband pay \$100 per month alimony, and that to secure it to the wife he should execute a mortgage on lands

which he owned in New Jersey. Personal service was made upon the husband in the New York divorce suit, and the decree for divorce, including the order to execute the mortgage, was obtained on the 1st day of July, 1892.

On the 19th of November, 1892, on the application of the wife's attorney, an order was entered in the New York court specifying the lands in New Jersey upon which the husband should execute the mortgage.

Thereupon the wife filed a bill in the Court of Chancery of this State to compel the husband to execute the mortgage in accordance with the New York judgment, and also to set aside conveyances of the property in this State by the husband, which are alleged to be fraudulent. . . .

It is undoubtedly true that the New York court had no power to create a lien upon New Jersey lands, and it is also true that the New York court could have acted upon the person of the husband while within its jurisdiction and constrained him to execute such a writing as would have been effective to pass the title to, or establish a lien on, the New Jersey lands. The question, however, is not what the New York court could have done, but what the courts of New Jersey, in discharge of her constitutional obligations, should do in aid of the wife after rendition of the judgment in New York.

The New York court having jurisdiction of the person of the husband and also of the subject-matter of the suit there, the judgment in that State, as between the parties to that suit, was conclusive of the right of the wife to have the husband execute a mortgage upon the New Jersey lands, although it did not of its own force create a lien upon the lands. As to the title to such lands, it had the effect of an admitted legal contract or obligation by the husband to convey and should be enforced in equity here.

A judgment in New York that a party defendant shall specifically perform a written contract to convey lands in New Jersey would furnish no better foundation for the interference of our court of equity than the judgment relied upon in this case. In what respect they differ in principle is not apparent. In either case obedience to the mandate of the federal Constitution would give effect to the judgment here.

In *Elizabeth Savings Institution v. Gerber*, 8 Stew. Eq. 153, this court held that a judicial order in New York that the garnishee owes a debt to the defendant in a judgment, such moneys being in the custody of a court of equity, creates *per se* a right to apply to such court for such moneys in the same way as an assignment of such moneys to the plaintiff in the judgment would have passed such right. Such a decree in the New York court settled the plaintiff's right to the fund, and that right was an equitable one, which was enforced in this State.

The decree or judgment in New York has the effect of being not merely *prima facie* evidence, but conclusive proof of the rights thereby

adjudicated, and a refusal to give it the force and effect in this respect which it had in the State in which it was rendered denies a right secured by fundamental law.

The force and effect of the decree for alimony in New York was not to create a lien upon lands in New Jersey, but to conclusively entitle the wife to have that decree enforced against the husband.

It being competent for our courts to enforce such a decree made in our own courts by establishing it as a lien on lands, we cannot refuse like relief in this case on the extraterritorial judgment. *Huntington v. Attrill*, 146 U. S. 657; *McElmoyle v. Cohen*, 13 Pet. 312.

In *Cheever v. Wilson*, 9 Wall. 108, 121, there was an order of the divorce court in Indiana directing the wife to pay one-third of her rents as they became due to her husband. The land was in Washington, where suit was brought to enforce payment of the rents to the husband. The court said that the decree in Indiana, so far as it related to the real property in question, could have no extraterritorial effect; but if valid, it bound these who were parties in the case, and could have been enforced in the *situs rei* by proper proceedings for that purpose.

The judgment in New York must be regarded as conclusively imposing a legal personal obligation or duty upon the husband to mortgage his lands in New Jersey.

The New York judgment is conclusive between the parties to it —

First. As to the right to a divorce.

Second. As to the right of the wife to the alimony allowed.

Third. It is equally conclusive, as against the husband, as to her right to have such alimony secured by a mortgage on his New Jersey lands, that being expressly a part of the adjudication in New York.

The judgment imposed an obligation upon the husband from which he cannot relieve himself by removing from the jurisdiction in which it was rendered; that obligation follows him into this State.

The lien does not by mere force of the extraterritorial judgment attach to lands in this State. To impress that lien upon lands here the intervention of our court of equity is necessary, just as it is necessary to sue here upon a New York judgment before execution can issue from our courts to obtain satisfaction of it.

The husband has had his day in court in New York, where all these questions have been adjudicated against him, and our courts should hold that he is thereby concluded.

The question in its true form is whether we will give full faith and credit to the judgment of the New York court in so far as it finally adjudges the questions legally submitted to it, when it had jurisdiction both of the subject-matter of the controversy and of the parties to it.

It seems to me that there can be but one answer to this question, and that the court below erred in dismissing the complainant's bill.¹

¹ Execution will not be issued on the judgment of another State of the Union without suit upon the judgment. *McElmoyle v. Cohen*, 13 Pet. 312; *Turley v. Dreyfus*, 35 La. Ann. 510; *Lamberton v. Grant*, 94 Me. 508, 48 Atl. 127. — Ed.

BULLOCK v. BULLOCK.

SUPREME COURT OF NEW JERSEY. 1895.

[*Reported 57 New Jersey Law, 508.*]

VAN SYCKEL, J. The declaration in this case is founded upon a decree of the Supreme Court of New York, directing the payment of alimony by the defendant to the plaintiff at \$100 per month. The declaration alleges that there is due upon said decree the sum of \$1,600, and that the defendant promised to pay the amount so due.

The declaration further avers that the Supreme Court of New York is a court of general jurisdiction, and that it had jurisdiction over the parties and the subject-matter of the suit, the said defendant having been duly served with process, and having appeared and answered the bill of complaint in that court.

To this declaration the defendant filed a general demurrer.

In *Van Buskirk v. Mulock*, 18 N. J. L. 184, Chief Justice Hornblower held that, at the common law, an action of debt will not lie on a decree of a court of equity for the payment of money.

In the recent case of *Mutual Fire Insurance Co. v. Newton*, 50 N. J. L. 571, this court discussed that question, taking the contrary view and citing a number of cases in support of it.

In *Evans v. Tatum*, 9 Serg. & R. 252, Chief Justice Tilghman gave a foreign decree in equity the conclusive force of a judgment between the parties to a suit on it in Pennsylvania.

The same rule prevails in the courts of Massachusetts and New York. *Howard v. Howard*, 15 Mass. 196; *Rigney v. Rigney*, 127 N. Y. 408.

The question as to the conclusive effect of the decree is no longer an open one in this State. In the recent case of *Bullock v. Bullock*, 52 N. J. Eq. 561, the Court of Errors and Appeals, while refusing to establish a decree for alimony made in New York as a lien upon lands in New Jersey, declared "that the decree in New York conclusively determined the status of the parties to that action, and that the marital relation previously existing between them had been absolutely dissolved.

"If, by the direction to pay alimony an indebtedness arises from time to time, as such payments become due, an action at law will lie thereon, and the decree will furnish conclusive evidence of such indebtedness."

The allegations in the declaration show a sufficient legal basis for the plaintiff's action, and the demurrer should be overruled, with costs.¹

¹ *Acc.* *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Rogers v. Rogers*, 15 B. Mon. 364; *Allen v. Allen*, 100 Mass. 373; *Wood v. Wood*, 7 N. Y. Misc. 579; *Arrington v. Arrington*, 127 N. C. 190, 37 S. E. 212; *Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 391. — ED.

LYNDE v. LYNDE.

SUPREME COURT OF THE UNITED STATES. 1901.

[Reported 181 *United States*, 183.]ERROR to the Supreme Court of the State of New York.¹

GRAY, J. — By the Constitution and the act of Congress, requiring the faith and credit to be given to a judgment of the court of another State that it has in the State where it was rendered, it was long ago declared by this court: "The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit." *McElmoyle v. Cohen*, 13 Pet. 312, 325; *Thompson v. Whitman*, 18 Wall. 457, 463; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 292; *Bullock v. Bullock*, 6 Dickinson (51 N. J. Eq.) 444, and 7 Dickinson (52 N. J. Eq.) 561.

The decree of the Court of Chancery of New Jersey, on which this suit is brought, provides, first, for the payment of \$7,840 for alimony already due, and \$1,000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of \$80 per week; and third, for the giving of a bond to secure the payment of these sums, and, on default of payment or of giving bond, for leave to apply for a writ of sequestration, or a receiver and injunction.

The decree for the payment of \$8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver, and injunction, being in the nature of execution and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended on the local statutes and practice of the State, and involved no Federal question.

On the writ of error of the wife, therefore,

The judgment is affirmed.

¹ Statement of facts and part of the opinion of the court, involving another question, are omitted. — ED.

HOLKER v. PARKER.

COURT OF CASSATION, FRANCE. 1819.

[Reported 21 *Bulletin des Arrêts*, 119.]

By a judgment of May 14, 1814, the Tribunal of Boston condemned Parker, an American, to pay Holker, a Frenchman, a sum of nearly three millions in settlement of a commercial partnership. Parker lived in France, and had there acquired both movable and immovable property, on which Holker prayed the Civil Tribunal of the Seine to authorize the execution of the judgment of the Tribunal of Boston.

The Tribunal of the Seine did in fact declare the Boston judgment executory. This decree was made without examination or knowledge of the merits, and upon an appeal by Parker the Royal Court of Paris reversed the judgment for the following reasons:¹—

THE COURT. Judgments rendered by foreign courts have neither effect nor authority in France; this rule is doubtless more particularly applicable in favor of Frenchmen, to whom the king and his officers owe a special protection, but the principle is absolute, and may be invoked by all persons, without distinction, being founded on the independence of States. The ordinance of 1629, in the beginning of its article 121, lays down the principle in its generality when it says that judgments rendered in foreign kingdoms and sovereignties, for any cause whatever, shall have no execution in the kingdom of France, and the Civil Code, art. 2123, gives to this principle the same latitude when it declares that a lien cannot result from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal (which is not a matter of mere form, like the granting in past times of a *pareatis* from one department to another for judgments rendered within the kingdom, but which assumes, on the part of the French tribunals, a cognizance of the cause, and a full examination of the justice of the judgment presented for execution, as reason demands, and that this has always been practised in France, according to the testimony of our ancient authorities). There may result from this an inconvenience, where the debtor, as is asserted to have happened in the present case, removes his property and his person to France, while keeping his domicile in his native country; it is for the creditor to be watchful, but no consideration can impair a principle on which rests the sovereignty of governments, and which, whatever be the case, must preserve its whole force.

Holker appealed; but the appeal was dismissed by the Court of Cassation for the following reasons:—

¹ The decree of the Royal Court is Mr. Justice Gray's translation of the decree as given in Merlin's *Questions de Droit*, Jugement, § 14, No. 2, and is found in his opinion in *Hilton v. Guyot*, 159 U. S. 113, 215.—Ed.

THE COURT. The ordinance of 1629 enacted, in absolute terms and without exception, that foreign judgments should not have execution in France; it was only by the Civil Code and the Code of Civil Procedure that the French tribunals have been authorized to declare them executory; the ordinance of 1629, therefore, had no application. The articles of the Codes referred to did not authorize the courts to declare judgments rendered in a foreign country executory in France without examination; such an authorization would be as contrary to the institution of the courts as would be the award of the refusal of execution arbitrarily and at will, would impeach the right of sovereignty of the French government, and was not in the intention of the legislature, which, while it has permitted the execution of judgments of arbitrators clothed by law with the judicial character upon a simple *pareatis* has been careful to confide the power of granting an order of *exequatur* to the presiding judge, and not to the tribunal, because a tribunal can pronounce judgment only after deliberation, and even upon default should grant prayers addressed to it only after they have been found just and true (Articles 116 and 150 of the Code of Procedure).

The Civil Code and the Code of Procedure make no distinction between judgments pronounced in a foreign country, permitting the judges to declare them all executory.

Therefore, judgments being without doubt subject to examination by the provisions of the Civil Code when pronounced against Frenchmen, it is necessary to hold that all others should be rendered executory only after examination of the merits; unless we were to add to the law, and introduce into it an arbitrary distinction unfounded in reason or authority.

It follows that in rejecting the exception of *chose jugée* which was claimed to result from a judgment pronounced in a foreign country, and in ordering the plaintiff to produce the evidence upon which his action is based, to be answered by Parker and to be passed upon by the court after full investigation, the Royal Court of Paris made a just application of Articles 2123 and 2128 of the Civil Code and 546 of the Code of Procedure. For these reasons,

Appeal dismissed.

TILKIN-MENTION v. BYRNE.

COURT OF LIÉGE. 1875.

[Reported 3 *Clunet*, 298.]

BYRNE, having obtained a judgment from the Tribunal of Luxembourg, sued Tilkin in the Tribunal of Commerce of Liège, his domicile, to have the judgment declared executory. Incompetence having been set up in defence, the plaintiff abandoned his claim for an *exequatur*

and declared upon the original claim. The defendant objected that since he had voluntarily chosen a foreign court he can no longer sue in a Belgian court, which has power no longer to do anything but grant an *exequatur* for the foreign judgment.

THE COURT. No text of the law and no principle of public policy forbids a foreigner who has gained a suit against a Belgian in a foreign country to sue him again on the same claim before a Belgian court. It is to be remarked that the demand for an *exequatur* puts the *chose jugée* entirely in question; and it is impossible to see why, if the question may be raised in that way it could not also be raised by bringing the whole question before a court which has jurisdiction of the subject-matter. To hold otherwise would be to give a foreign judgment in Belgium more force than it can have without the grant of an *exequatur*.

ECONOMO v. MESCIADIS.

COURT OF APPEAL OF ALEXANDRIA. 1877.

[Reported 3 *Recueil Officiel*, 34.]

THE COURT. By the terms of Article 468 of the Code of Civil Procedure judgments pronounced abroad by a foreign court are executory in Egypt on the simple order of the President of the Tribunal, but on condition of reciprocity; and it is proper therefore to see whether this reciprocity exists in Greece, since the question is as to process of execution on the judgment of one of her local courts.

By the terms of Article 859 of the Hellenic Code of Civil Procedure foreign judgments are made executory in Greece by the simple order of the President of a Tribunal when all parties are foreigners; but it is not so when one of the parties is Greek. In that case, according to the provisions of the same article, foreign judgments can be executed in Greece only upon order of a Tribunal of First Instance, and after an examination of the merits. By the terms of the next article these Tribunals may refuse execution if they find that the foreign judgment is opposed to the facts or is contrary to public policy.

These provisions affect not merely procedure, but the substantive law as well, since it follows that judgments pronounced abroad between foreigners and Greeks are not executory in Greece of strict right, and that the Hellenic Tribunals may examine the merits, determine whether they are contrary to the true facts, discuss them, reopen the arguments, and definitively modify them or even consider them null. There does not exist, therefore, between Greece and Egypt absolute reciprocity, and we must consider what is the consequence of this difference between the two systems of law, whose provisions have not been modified by any diplomatic treaty.

It is not possible to admit that Article 468 of the Egyptian Code of

Civil Procedure deprives foreign judgments of any execution in Egypt whenever the most complete reciprocity does not exist. Such an interpretation would cause trouble in international business and relations. In requiring reciprocity the Egyptian legislator has merely intended to grant in Egypt no greater force and value to foreign judgments than the State which pronounced them grants to judgments of the Egyptian courts; and the law must obviously be so interpreted. It follows that in the present case of a Greek judgment between a Greek and an Ottoman subject the President of the Tribunal can order an execution only after having first sent the parties before the Tribunal of First Instance to determine whether the judgment of the Tribunal of Syra contains any provision contrary to the facts proved or to public policy. In this way would be preserved both the rules of reciprocity which serve as the basis of Article 468 and also the provision of the same article that the order for execution shall proceed from the President.

It is no objection to this method of procedure that it is not formally prescribed by Article 468, since by the terms of Article 11 of the Civil Code, repeated in Article 34 of the Rules for the organization of the courts, the judge, in the case of silence, insufficiency, or obscurity of the statute, shall supply the lack in conformity with the principles of natural law and the rules of equity. Placed by the insufficiency of the text in the necessity of refusing any execution in Egypt to the judgment of the Tribunal of Syra, or of having recourse to a procedure analogous to that of Greece to supply the omissions of Article 468, the judge should not hesitate to adopt the latter course.

The President so well understood the inconvenience and danger of refusing any execution that he held himself competent, by virtue of the principle of reciprocity, to modify one of the provisions of the judgment of Syra, which he considered contrary to the public policy of Egypt; and he ordered execution only of the remainder of the judgment. But in so acting without sending the case to the Tribunal he has violated rules of reciprocity which he intended to follow. His order should therefore be modified by sending the parties before the Tribunal of First Instance, that the President may make such order, in accordance with its decision, as shall seem fit.¹

¹ Cited and followed in *Geisser v. Wives of Ismail Pacha*, 11 Rec. Off. 14. "It is not permitted to the Court of Appeal to go into an examination of the question on the merits. In this particular, we should presume that the foreign magistrates have conscientiously fulfilled their duty of granting justice to whom it was due." Court of Cassation of Naples, in *Feraud v. Dreyfus*, 1 *Annali della Giur. Ital.* I. 120 (1866). *Acc.*, Court of Cassation of Florence, *Sanna v. Dubosc*, 2 *Annali*, I., 35 (1867).

"International relations admit the principle of reciprocity as one which rests upon the right of equality of treatment and in fact opens the way for the exercise of the right of retortion." Court of Cassation of Turin, in *Levi v. Pitre*, 8 *Annali*, I., 380 (1874). — ED.

W. v. J.

REICHSGERICHT. 1882.

[Reported 7 *Entscheidungen des Reichsgerichts, Civilsachen*, 406.¹]

THE defendant is a shipowner residing in the Grand-duchy of Oldenburg. One of his vessels was shipwrecked in the Thames, and in consequence vessel and cargo were sold in London for account of those concerned. The total proceeds were paid to the defendant's agents in London, W. & G. The plaintiffs, I. & Co. in London, had a claim of £119 14s. 1d. payable out of the proceeds, as part owners of the cargo. Not being able to recover this amount from W. & G., who had in the meantime become insolvent, they sued the defendant in a London court. The defendant accepted service without disputing the jurisdiction of the court in question; the Court of First Instance found for the plaintiff, and the defendant's appeal was dismissed. The judgment having become valid, the plaintiffs sued defendant in the provisional court at Oldenburg, asking the court to declare the plaintiff's right to execution by issuing a writ of execution (Code of Procedure, § 660).

The defendant contested the plaintiff's claim on the basis of section 661 [Sec. 2, Nos. 3 and 5], asserting that the jurisdiction of the English courts in the action in question was not justified according to German law, and that reciprocity in England was not guaranteed. The provisional court issued the writ of execution as asked for by the plaintiff. The defendant's appeal was dismissed, the Court of Second Instance deciding that the jurisdiction of the English courts, required by section 661 [Sec. 2, No. 3], although not existing originally, was justified by a tacit understanding according to sections 38, 39, Code of Procedure, and that reciprocity must be considered as guaranteed according to the established practice of the English courts. With regard to the latter point, the Court of Appeal rested its decision on the assumption, that a guarantee of reciprocity is not only found in treaties or statutes, but that it exists already, when, as a matter of fact, the judgments of German courts are executed in a foreign country, without further examination of the legality of such judgments. The court was further of opinion, that the only point to be decided in a particular case was, whether the execution of a German judgment of the same kind could be considered as guaranteed in the foreign State in question, and the court held that in the present case this question must be answered in the affirmative, because the points raised by the defendant against the judgment, of which the execution was demanded, were according to his statement only the following:—

(1) That the judgment had been obtained by an incorrect representation of the facts; (2) that he had a counter-claim against

¹ The translation is that found in Piggott, *Foreign Judgments*, 2d ed., 470.—Ed.

plaintiff; points of this kind, however, could not have been raised in an English court, when the execution of a foreign judgment was in question.

The defendant appealed to the Reichsgericht and was successful, the plaintiff's claim being dismissed for the following reasons : —

THE COURT. The recognition of the jurisdiction of the English courts, as based on tacit understanding, cannot be legally objected to.

The defendant, in his contention before us, has confined himself to maintaining that the supposition of the Court of Appeal that reciprocity is guaranteed in England is erroneous in point of law. He has supported his contention by asserting (1) that the habitual practice of foreign courts, as a matter of fact, could not be considered as a guarantee of reciprocity; (2) that according to the rules adopted by the practice of the English courts a further examination of the legality of foreign judgments (of which execution is demanded) is allowed contrary to the requirements of reciprocity.

The rules which English courts apply with regard to the execution of foreign judgments form, according to the English legal conception, a part of the common law, that is of the *lex non scripta*, which only exists in the mind of the judges (*in gremio magistratum*), and which rule on the principle that legal practice (*jurisprudenz*) is binding as law in the same manner as law created by statute.

If the security for reciprocity required by the expression "being guaranteed" may be found, according to the intention of the Code of Procedure, as appears from the minutes of the Committee of Justice, p. 334, section 440, and as other imperial statutes determine (German Criminal Code, §§ 102, 103, 187), not only in international treaties, but also in the existence of corresponding laws enacted by the foreign State, the expression "law" must include here, as well as in section 12 of the act introducing the Code of Civil Procedure, every legal norm (*Rechtsnorm*), and it can therefore make no difference whether the laws in question belong to the written or the unwritten law of the foreign State. As a matter of course, however, there can be no question of a guarantee by law, unless the existence of the laws in question be beyond doubt. The guarantee of reciprocity might therefore be affirmed with regard to England, if it could be safely assumed that a principle of law exhausting the requirements of reciprocity exists, and is universally recognized by the English courts.

According to section 661 [Sec. 1] of the Code of Procedure, the writ of execution is to be issued without an examination of the legality of the decision. The German courts, therefore, are bound to the unqualified recognition of the legal validity (*Rechtskraft*) of the judgments of foreign courts (which are to be enforced by them) after they have become valid by the law of the State in which they have been obtained. It is therefore an essential requirement of reciprocity that the law of the foreign State should recognize in an equal degree the legal validity of the judgments of German courts (which

are to be enforced by its courts), and that an examination of their legality, both as regards the material justice of the decision as to matters of fact or law, and with respect to matters of procedure, should neither be required as a condition of their execution by the court, *ex officio*, nor be allowed by the admission of pleas which might lead to it. The question remains, whether beyond this there is a further general requirement of reciprocity according to which it is necessary that the law of the foreign State imposes no conditions on the admissibility of the execution of foreign judgments beyond those contained in section 661 [Sec. 2, §§ 2, 3, 4] (these requirements would be that the act to be enforced is enforceable according to the law of the country, that the courts of the foreign State are competent according to the law of the country, that in the case of a judgment against a contumacious German, service has been effected in the prescribed manner), or whether, as the Court of Appeal has decided, the question of reciprocity is only to be decided with regard to the converse case and that uniformity may be said to exist when there is a guarantee that a judgment of the same kind would be enforced in the foreign country; but this question need not be decided with reference to the case before us.

The Court of Appeal has, however, based its decision on the further assumption, that with regard to the question whether the execution of a German judgment of the same kind is guaranteed in England, it is sufficient to ascertain whether the English law admits objections of the same kind as the present defendant thinks he can raise against the English judgment (according to his statement), which objections, as a matter of fact, are directed only against the material justice of the decision. This assumption is erroneous in law because, after what has been said, the point to be established, with reference to the question of reciprocity (even if it be confined to judgments of the same kind), is, whether according to the English law it is in any case possible to impugn the legality of the decision, and because reciprocity may also be considered endangered by the admissibility of pleas of a different kind. That this assumption is bad in law may also be concluded from the fact that, according to section 661 [Sec. 1], the defendant's objection against the legality of the judgment which is to be enforced cannot be considered in Germany, and that therefore he cannot be bound to declare himself as to the objections which he might be able to raise, if any objections were admissible, in consequence of which the German judge — as a mere matter of procedure — is already disabled from being guided by the position of the foreign law with regard to these particular objections.

The judgment in question must therefore be annulled, and with regard to the matter itself, the decision must be altered as to the question of reciprocity.¹ . . .

It appears from all these facts, that even in the present state of English legal practice, it is possible to contest the legality of the

¹ The court here examined the condition of the English law upon the subject. — Ed.

judgments of German courts, of which execution is demanded in an English court, that this can be done by pleas, the admissibility of which is partly undisputed, partly dependent on the settlement of controversies which are still in existence, that especially the competence of a German court (supposing it had arrived at a decision under the same circumstances as the English court in the case before us) could not be considered established beyond doubt in England; and that further (which fact has a generally binding significance) the pleas in question include some which, according to their legal intention, could be urged against any foreign judgment (viz. those alleging apparent error and fraud), and the success of which can in a good many cases only depend on an extensive measure of judicial discretion. In such a state of the law the guarantee of reciprocity required by section 661 cannot be found.¹

DREYFUS *v.* THE CINQUE-SORELLE.

COURT OF CASSATION, FRANCE. 1882.

[*Reported 9 Clunet*, 530.]

THE COURT. When a Frenchman voluntarily submits to a foreign court his disputes with a foreigner, a judicial contract between the parties is formed which prevents the Frenchman, as well as the foreigner, from suing again in a French court on the claim which has been litigated abroad by his free consent.

It appears from the judgment in question that Dreyfus et Cie. sued in an Italian court for damages for delay in lading the vessel which was substituted for the Cinque-Sorelle; this act, which implies on their part the exercise of a personal free choice, in the absence of any complaint, protest, or reservation to the contrary on their part, will not permit them to litigate their claim anew before the French courts. Under these circumstances the court below has violated no law in refusing to entertain the suit.

Appeal rejected.

APPEAL OF X.

TRIBUNAL OF THE SEINE. 1886.

[*Reported 13 Clunet*, 712.]

MADAME X., French by birth, married at Paris, before the French officer of civil status, a foreigner who was subsequently naturalized as

¹ But see a decision of Reichsoberhandelsgericht (21 Entsch. 14) to the effect that, as a general rule, sufficient reciprocity exists in the practice of the United States. — ED.

a Swiss citizen of the Canton of Geneva. A final judgment in a contested suit in the Tribunal of Geneva decreed a divorce between the parties. Madame X. claiming to have become French again by the dissolution of her marriage, desired to have the judgment of divorce recorded in the margin of the act of marriage at the City Hall of Paris, where the marriage was celebrated. The mayor deemed himself unable to make this record until the judgment of divorce had been made executory in France. Madame X demanded an *exequatur* in this court.

THE TRIBUNAL. By a contradictory judgment dated May 14, 1886, the Civil Tribunal of the Republic and Canton of Geneva pronounced in favor of Madame X a decree of divorce from her husband X. The documents introduced show that this is a final judgment. Madame X demands that this judgment be rendered executory in France. But the status of a foreigner in France being ruled by his statute personal, it follows that the decisions of the courts of his country, which alone are competent to fix or modify this status, are applicable as a matter of right in France, like the law in virtue of which they have been rendered. Besides, the judgment in question, having regard to its tenor, is not of a nature to give rise to acts of execution in the sense of Article 546 of the Code of Civil Procedure. There is, therefore, no room for a grant of *exequatur*.

The *exequatur* is therefore refused, with costs to be paid by Madame X.

LANDESBRANDCASSE v. ASSURANCES BELGES.

CIVIL TRIBUNAL OF BRUSSELS. 1893.

[Reported 21 *Clunet*, 164.]

THE TRIBUNAL. The plaintiff demands an *exequatur* for two judgments pronounced by the Tribunal of Kiel and a decree of the court of Kiel between the parties, on October 24, 1888, and May 1 and December 6, 1889. It is not disputed that the judgments in question satisfy the requirements of Article 10 of the law of March 25, 1876.

It was stipulated in a verbal agreement, the terms of which are undisputed, that all disputes arising out of the contract should be judged and determined by the ordinary Tribunal of Kiel, to the judgment of which the "Assurances Belges" company submitted without objection. The question to be decided is, whether by the aforesaid agreement the parties desired and were able to take away from the Belgian judge the right of revision to which foreign judgments are submitted by the law of March 25, 1876.

The right of revision is an emanation of the right of sovereignty;

it proceeds from the *imperium* and is therefore a matter of public concern. It follows clearly from this principle that if the legislature does not grant executory force to foreign judgments when there exists no treaty based on reciprocity, it is not competent for the parties to substitute their will for that of the legislature, arrogating to themselves the power of delegating to the foreign judge a portion of the sovereignty. One cannot liken an agreement conferring competence on a regular foreign judge to an agreement for arbitration; though the judge, it is true, bases his competence upon the agreement, yet he obtains his quality as judge from the authority of his sovereign. Besides, even supposing that parties could by a special agreement attribute executory force to a foreign judgment, still one must decide whether they intended to oust the Belgian judge from the right and duty of revision. If one considers the purpose of the aforesaid agreement, one sees that nothing else was intended except to confer jurisdiction upon a foreign judge for settling the differences which might arise out of the contract between the parties; there was no intention of imposing upon the Belgian judge rules to follow in respect to the execution of decisions that might be rendered in future suits. In this case it is not a question of settling a difference of this sort, for which, by choice of the parties, the foreign judge alone is competent, it is a question, upon this application for *exequatur*, of determining whether decisions which have been rendered are executory in Belgium. If in fact such a determination involves an investigation of the merits, this investigation is not the object of the suit, and is not contrary to the agreement of the parties. They have evidently not contemplated, in submitting their differences to a foreign judge, the regulation of the powers of a judge to whom application for an *exequatur* is made, for they were aware that they could not by contract alter the provisions of the law in such a case.

If the argument of the plaintiff were admitted this extraordinary and impossible conclusion would follow; that no foreign judgment pronounced after a contest could ever be revised. For it would necessarily be true that the party against whom judgment had been given had allowed himself to be judged by a foreign judge; and thereby the Belgian judge, even in the absence of a treaty of reciprocity, would be deprived of the right and duty which the law itself confers upon him.

SECTION III.

THE JUDGMENT AS RES JUDICATA.

CROUDSON v. LEONARD.

SUPREME COURT OF THE UNITED STATES. 1808.

[Reported 4 Cranch, 434.]

JOHNSON, J. The action below was instituted on a policy of insurance.

On behalf of the insurers, it was contended that the policy was forfeited by committing a breach of blockade. It is not, and cannot be made a question, that this is one of those acts which will exonerate the underwriters from their liability. The only point below was relative to the evidence upon which the commission of the act may be substantiated. A sentence of a British prize court in Barbadoes was given in evidence, by which it appeared that the vessel was condemned for attempting to commit a breach of blockade. It is the English doctrine and the correct doctrine on the law of nations, that an attempt to commit a breach of blockade is a violation of belligerent rights, and authorizes capture. This doctrine is not denied, but the plaintiff contends that he did not commit such an attempt, and the court below permitted evidence to go to the jury to disprove the fact on which the condemnation professes to proceed.

On this point, I am of opinion that the court below erred.

I do not think it necessary to go through the mass of learning on this subject, which has so often been brought to the notice of this court, and particularly in the case of *Fitzsimmons*, argued at this term. Nearly the whole of it will be found very well summed up in the 18th chapter of Mr. Park's Treatise. The doctrine appears to me to rest upon three very obvious considerations: the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction — the very great inconvenience amounting nearly to an impossibility of fully investigating such cases in a court of common law — and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world.

It is sometimes contended that this doctrine is novel, and that it takes its origin in an incorrect extension of the principle in *Hughes v. Cornelius*. I am induced to believe that it is coeval with the species of contract to which it is applied. Policies of insurance are known to have been brought into England from a country that acknowledged the civil law. This must have been the law of policies at the time when

they were considered as contracts proper for the admiralty jurisdiction, and were submitted to the court of policies established in the reign of Elizabeth. It is probable that, at the time when the common law assumed to itself exclusive jurisdiction of the contract of insurance, the rule was too much blended with the law of policies to have been dispensed with, had it even been inconsistent with common law principles. But, in fact, the common law had sufficient precedent for this rule, in its own received principles relative to sentences of the civil law courts of England. It may be true that there are no cases upon this subject prior to that of *Hughes v. Cornelius*, but this does not disprove the existence of the doctrine. There can be little necessity for reporting decisions upon questions that cannot be controverted. Since the case of *Hughes v. Cornelius*, the doctrine has frequently been brought to the notice of the courts of Great Britain in insurance cases, but always with a view to contest its applicability to particular cases, or to restrict the general doctrine by exceptions, but the existence of the rule or its applicability to actions on policies is nowhere controverted.

I am of opinion that the sentence of condemnation was conclusive evidence of the commission of the offence for which the vessel was condemned, and as that offence was one which vitiated the policy, the defendants ought to have had a verdict.

WASHINGTON, J. The single question in this case is, whether the sentence of the admiralty court at Barbadoes, condemning the brig "Fame" and her cargo as prize, for an attempt to break the blockade of Martinique, is conclusive evidence against the insured, to falsify his warranty of neutrality, notwithstanding the fact stated in the sentence as the ground of condemnation is negated by the jury?

This question has long been at rest in England. The established law upon this subject in the courts of that country is, that the sentence of a foreign court of competent jurisdiction condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided, that it can never be controverted, directly or collaterally, in any other court having concurrent jurisdiction.

This doctrine seems to result from the application of a legal principle which prevails in respect to domestic judgments, to the judgments and sentences of foreign courts.

It is a well established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose. It is not only conclusive of the right which it establishes, but of the fact which it directly decides.

This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem*, but any person having an

interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that, in this respect, he also represents the insurer. That irregularities have sometimes taken place, to the exclusion of a fair hearing of the parties, is not to be denied. But this furnishes no good reason against the adoption of a general rule. A spirit of comity has induced the courts of England to presume that foreign tribunals, whether of prize or municipal jurisdiction, will act fairly, and will decide according to the laws which ought to govern them; and public convenience seems to require that a question which has once been fairly decided should not again be litigated between the same parties, unless in a court of appellate jurisdiction.

The irregular and unjust decisions of the French courts of admiralty of late years have induced even English judges to doubt of the wisdom of the above doctrine in relation to foreign sentences, but which they have acknowledged to be too well established for English tribunals to shake; and the justice with which the same charge is made by all neutral nations against the English as well as against the French courts of admiralty, during the same period, has led many American jurists to question the validity of the doctrine in the courts of our own country. It is said to be a novel doctrine, lately sprung up, and acted upon as a rule of decision in the English courts, since the period when English decisions have lost the weight of authority in the courts of the United States. It is this position which I shall now examine, acknowledging that I do not hold myself bound by such decisions made since the revolution, although, as evidence of what the law was prior to that period, I read and respect them.

The authority of the case of *Hughes v. Cornelius*, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted; but its application to a question arising under a warranty of neutrality between the insurer and insured is denied. It is true that, in that case, the only point expressly decided was, that the sentence was conclusive as to the change of property effected by the condemnation. But it is obvious that the point decided in that case depended, not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences.

This case, as far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an English court acting upon the same subject; and we have seen that, by the general rule of law, the latter, if conclusive at all, is so as to the fact directly decided, as well as to the change of property produced by the establishment of the fact. Hence it would seem to follow, that if the sentence of a foreign court of admiralty be conclusive as to the property, it is equally conclusive of the matter or fact directly decided. What

is the matter decided in the case under consideration? That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property produced by the sentence of condemnation is a consequence of the matter decided, that she was, in effect, enemy-property. Can the parties to that sentence be bound by so much of it as works a loss of the property, because it was declared to be enemy-property, and yet be left free to litigate anew in some other form, the very point decided from which this consequence flowed? Or upon what just principle, let me ask, shall a party to a suit, who has once been heard, and whose rights have been decided by a competent tribunal, be permitted in another court of concurrent jurisdiction, and in a different form of action, to litigate the same question, and to take another chance for obtaining a different result? I confess I am strongly inclined to think that the case of *Hughes v. Cornelius* laid a strong foundation for the doctrine which was built upon it, and which for many years past has been established law in England. This opinion is given with the more confidence, when I find it sanctioned by the positive declarations of distinguished law characters — men who are, of all others, the best able to testify respecting the course of decisions upon the doctrine I am examining, and the source from which it sprung.

In the case of *Lothian v. Henderson*, 3 Bos. & Pull. 499, *Chambre, J.*, speaking upon this point, says that the sentence of the French court was in that case conclusive against the claim of the assured, “agreeable to all the decisions upon the subject, beginning with the case of *Hughes v. Cornelius* (confirmed as that was by the opinion of Lord Holt in two subsequent cases), and pursuing them down to the present period. It is true,” he observes, “that in *Hughes v. Cornelius*, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute. But from that period to the present, the doctrine there laid down respecting foreign sentences has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover.” *Le Blanc, J.*, says, “that these sentences are admissible and conclusive evidence of the fact they decide, it seems not safe now to question: From the time of *Car. II.* to this day, they have been received as such, without being questioned. In the discussion of the nature of such evidence before this house in 1776, it seems not to have been controverted; and the cases, I may say, are numberless, and the property immense, which have been determined on the conclusiveness of such evidence, in many of which cases the forms in which they came before the courts in Westminster Hall were such as to have enabled the parties, if any doubt had been entertained, to have brought the question before a higher tribunal.” *Lawrence, J.*, also speaking of the legal effect of a foreign sentence upon this point, says, “as to

which, after the continued practice which has taken place from the earliest period, in which, in actions on policies of insurance, questions have arisen on warranties, to admit such sentences in evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purport to decide directly, I apprehend it is now too late to examine the practice of admitting them to the extent to which they have been received, supposing that practice might, upon the argument, have appeared to have been doubtful at first." Rooke, J., Lord Eldon, and Lord Alvanley, all concur in giving the same testimony, that the doctrine under consideration had been established for a long period of years, by a long series of adjudication in the courts of Westminster Hall.

I cite this case for no other purpose but to prove by the most respectable testimony, that the case of *Hughes v. Cornelius*, decided in the reign of Car. II., had, by a uniform course of decisions from that time, been considered as warranting the rule now so firmly established in England. And when the inquiry is, whether the application of the principle laid down in that case to questions arising on warranties in actions on policies, be of ancient or modern date, I think I may safely rely upon the declarations of the English judges, when they concur in the evidence they give respecting the fact. It is true that no case was cited at the bar recognizing the application of the rule to questions between the insurer and insured, prior to the revolution, except that of *Fernandez v. Da Costa*, which I admit was a *Nisi Prius* decision. But were I convinced that the long series of decisions upon this point, from the time of *Hughes v. Cornelius*, spoken of by the judges in the case of *Lothian v. Henderson*, had been made at *Nisi Prius*, it would not, in my mind, weaken the authority of the doctrine. It would prove the sense of all the judges of England, as well as of the bar, of the correctness and legal validity of the rule. It is not to be supposed that if a doubt had existed respecting the law of those decisions, the point would not have been reserved for a more deliberate examination, before some of the courts of Westminster Hall. But the case of *Fernandez v. Da Costa* receives additional weight, when it is recollected that the judge who decided it was Lord Mansfield, and when upon examining it, we find no intimation from him that there was any novelty at that day in the doctrine. To this strong evidence of the antiquity of the rule, may be added that of Judge Buller, who, at the time he wrote his *Nisi Prius*, considered it as then established.

That the doctrine was considered as perfectly fixed in the year 1781, is plainly to be inferred, from the case of *Bernardi v. Motteux*, decided in that year. Lord Mansfield speaks of it as he would of any other well established principle of law, declaring in general terms, that the sentence, as to that which is within it, is conclusive against all persons, and cannot be collaterally controverted in any other suit. The only difficulty in that case was, to discover the real ground upon which the

foreign sentence proceeded, and the court in that and many subsequent cases laid down certain principles auxiliary to the rule, for the purpose of ascertaining the real import of the sentence in relation to the fact decided as between the insurer and insured. For if the sentence did not proceed upon the ground of the property not being neutral, it of course concluded nothing against the insured; since upon no other ground could the sentence be said to falsify the warranty.

It was admitted by the counsel for the insured, that, as between him and the insurer, the sentence is *prima facie* evidence of a non-compliance with the warranty. But if they are right in their arguments as to the inconclusiveness of the sentence, I would ask for the authority upon which the sentence can be considered as *prima facie* evidence. Certainly no case was referred to, and I have not met with one to warrant the position. If we look to general principles applicable to domestic judgment, they are opposed to it. We have seen that the judgment is conclusive between the same parties, upon the same matter coming incidentally in question. The judgment of a foreign court is equally conclusive except in the single instance where the party claiming the benefit of it applies to the courts of England to enforce it, in which case only the judgment is *prima facie* evidence. But it is to be remarked, that in such a case the judgment is no more conclusive as to the right it establishes, than as to the fact it decides. Now it is admitted that the sentence of a foreign court of admiralty is conclusive upon the right to the property in question; upon what principle, then, can it be *prima facie* evidence, if not conclusive, upon the facts directly decided? A domestic judgment is not even *prima facie* evidence between those not parties to it, or those claiming under them, and that would clearly be the rule, and for a similar reason as to foreign judgments. If between the same parties, the former is conclusive as to the right and as to the facts decided. This principle, if applied at all to foreign sentences, which it certainly is, is either applicable throughout, upon the ground that the parties are the same, or if not so, then by analogy to the rule applying to domestic judgments, the sentence cannot be evidence at all.

Upon the whole, I am clearly of opinion, that the sentence of the court of admiralty at Barbadoes, condemning the brig "Fame," and her cargo as prize, on account of an attempt to break the blockade of Martinique, is conclusive evidence in this case against the insured, to falsify his warranty of neutrality.

If the injustice of the belligerent powers, and of their courts should render this rule oppressive to the citizens of neutral nations, I can only say with the judges who decided the case of *Hughes v. Cornelius*, let the government in its wisdom adopt the proper means to remedy the mischief. I hold the rules of law, when once firmly established, to be beyond the control of those who are merely to pronounce what the law is, and if from any circumstance it has become impolitic, in a national

point of view, it is for the nation to annul or to modify it. Till this is done, by the competent authority, I consider the rule to be inflexible.¹

HOHNER v. GRATZ.

CIRCUIT COURT OF THE UNITED STATES, SO. DIST. NEW YORK. 1892.

[Reported 50 *Federal Reporter*, 369.]

BROWN, District Judge. The recent adjudication in Germany which is sought to be set up as a supplemental answer in bar of complainant's demand, is not, in my judgment, entitled to the force of an adjudication in an action like the present. The relief prayed for is to restrain the violation of the complainant's trade-mark in harmonicas, through any sales of the infringing harmonicas by the defendant in this country. The granting of such relief has reference not merely to the complainant's rights, but to the protection of the American public against imposition. *Medicine Co. v. Wood*, 108 U. S. 218-223, 2 Sup. Ct. Rep. 436. The question whether the alleged infringement is likely to impose upon the public, or whether it involves an unfair and inequitable business competition, depends upon the circumstances of the place. An injunction might be properly refused in Germany, and yet properly granted here, from the different circumstances which would necessarily enter into the decision.

Comity, moreover, does not require, nor does public policy permit, that the protection of the citizens of this country against imposition in transactions within its own territory, should in any degree be held subject to the decisions of any foreign tribunal. See *Brimont v. Penniman*, 10 Blatchf. 436. Cases like the present have no analogy to suits upon foreign judgments rendered on contracts, or other subjects of ordinary common law right, and are not within such adjudications as that of *Hilton v. Guyott*, 42 Fed. Rep. 249, and the cases there cited. Here the subject-matter is a tort, and an imposition upon the public alleged to be committed or about to be committed here. Such subjects are not concluded by foreign adjudications, even when the acts referred to are the same identical acts. Whart. Conf. Laws, §§ 793, 827.

But here the particular subject-matter of the two actions is not identically the same. Though similar torts or imposition in Germany may

¹ *Acc. Lothian v. Henderson*, 3 B. & P. 499; *Bolton v. Gladstone*, 5 East, 155; *Baxter v. New England Marine Ins. Co.*, 6 Mass. 277. *Contra*, *Ocean Ins. Co. v. Francis*, 2 Wend. 64; *Williamson v. Tunno*, 2 Bay, 388.

The recitals of the judgment are conclusive only as to facts explicitly determined to be true as the immediate and necessary basis for the judgment: *Fisher v. Ogle*, 1 Camp. 418; *Hobbs v. Henning*, 17 C. B. N. s. 791; *Robinson v. Jones*, 8 Mass. 536; *Bailey v. S. C. Ins. Co.*, 3 Brev. 354; and only in a suit involving the identical property libelled: *The Mary*, 9 Cranch, 126.—Ed.

have been the subject of the suit in the German tribunal, those acts are not the same as similar torts committed here; nor is the defendant the same, though he may be the agent of the German defendant. What is sought here is to restrain this defendant's torts within this country, and his imposition upon the American public; and that is a different subject from a restraint upon the principal in Germany against similar torts committed there. The motion is, therefore, on both grounds denied.¹

GREAT WESTERN TELEGRAPH CO. v. PURDY.

SUPREME COURT OF THE UNITED STATES. 1896.

[Reported 162 *United States*, 329.]

THIS was an action brought, August 30, 1888, in the District Court of Des Moines County in the State of Iowa, by the Great Western Telegraph Company, a corporation of Illinois, by its receiver, Elias R. Bowen, against Hiram Purdy, a citizen of Iowa, to recover the sum of \$437.50, with interest from July 10, 1886, alleged to be due from him to the company under his subscription to its stock, and under a decree of the Circuit Court of Cook County in the State of Illinois of that date, which ordered an assessment upon the stockholders of the company, and which was alleged to have been made in a suit to which he was a party, and to be binding upon him.²

GRAY, J. By articles 4, section 1, of the Constitution of the United States, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." In the exercise of the power so conferred, Congress, besides providing the manner in which the records and judicial proceedings of the courts of any State shall be authenticated, has enacted that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, that they have by law or usage in the courts of the State from which they were taken." Act of May 26, 1790, c. 11; 1 Stat. 122; Rev. Stat. § 905.

The plaintiff relied on the order of assessment, made by a court of the State of Illinois, as a judgment of that court, entitled to the effect of being conclusive evidence of the plaintiff's right to maintain this action against the defendant. The Supreme Court of the State of Iowa denied it that effect. The question whether that court thereby declined to give full faith and credit to a judicial proceeding of a court

¹ But see *Lea v. Deakin*, 11 Biss. 23. — ED.

² The statement of facts, arguments of counsel, and part of the opinion of the court, are omitted. — ED.

of another State, as required by the Constitution and laws of the United States, was necessarily involved in the decision.

This court therefore has jurisdiction of the case, but must judge for itself of the true nature and effect of the order relied on. *Armstrong v. Treasurer of Athens County*, 16 Pet. 281, 285; *Texas & Pacific Railway v. Southern Pacific Co.*, 137 U. S. 48; *Grover & Baker Co. v. Radcliffe*, 137 U. S. 287; *Carpenter v. Strange*, 141 U. S. 87; *Huntington v. Attrill*, 146 U. S. 657, 666, 683-686, and cases cited.

By the original contract between the parties, made in the State of Iowa on February 16, 1869, Purdy, the present defendant, agreed to take fifty shares, of the par value of \$25, in the plaintiff company, and to pay five per cent (which he did) and "the balance as the directors from time to time may order;" and the company agreed to issue the shares to him as soon as forty per cent had been paid.

On November 19, 1869, Purdy and other subscribers for shares filed in a court of the State of Illinois a bill in equity to compel the company to issue shares to them, and to set aside as fraudulent a contract by which the company had agreed to transfer all its capital stock to one Reeve; and upon that bill, on November 16, 1872, obtained a decree, setting aside that contract, and ordering shares to be issued to the subscribers as prayed for, and a new board of directors to be chosen. By that decree, all the objects of the suit were accomplished, so far as Purdy was concerned; and he does not appear to have had any notice of, or part in, any further proceedings. That bill did not ask for the appointment of a receiver, or for any order of assessment upon stockholders.

The subsequent proceeding, begun September 19, 1874, alleging mismanagement and fraud of the new officers and the insolvency of the company, was by other stockholders, and although entitled a "supplemental bill," and permitted by the court to be filed in the former cause, was a distinct proceeding, in which Purdy had and took no interest. The orders of the court upon this proceeding, appointing on October 7, 1874, a receiver, and on July 10, 1886, making a "call or assessment" upon the stockholders of the company, were entered without any notice to him, or consent on his part. He was not personally a party to this proceeding, nor named therein. The receiver was appointed almost two years, and the assessment ordered more than thirteen years, after Purdy had ceased to have any connection with the litigation.

There can be no doubt that, as heretofore declared by this court, "after a decree disposing of the issues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties, without a service of new process, or appearance, to institute further proceedings on new issues and for new objects, although connected with the subject-matter of the original litigation, by merely giving the new proceedings the title of the original cause. If his bill begins a new litigation the parties against whom he seeks relief are entitled to notice thereof, and without it they will not be bound." *Smith v. Woolfolk*, 115 U. S. 143, 148.

The question therefore is of the effect, as against Purdy, of the order for an assessment, made by the Illinois court in a proceeding to which the corporation was a party, but to which he personally was not.

The order of that court was in effect, as it was in terms, simply a "call or assessment" upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the court, having by that appointment assumed the charge of the assets and the affairs of the corporation, took the place and exercised the office of the directors. *Scovill v. Thayer*, 105 U. S. 143, 155; *Hawkins v. Glenn*, 131 U. S. 319, 329; *Lamb v. Lamb*, 6 Biss. 420, 454; *Glenn v. Saxton*, 68 Cal. 353; *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 636, 640; *Great Western Tel. Co. v. Loewenthal*, 154 Ill. 261.

The order of assessment, whether made by the directors as provided in the contract of subscription, or by the court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him. *Hawkins v. Glenn*, 131 U. S. 319; *Glenn v. Liggett*, 135 U. S. 533; *Glenn v. Marbury*, 145 U. S. 499.

But the order was not, and did not purport to be, a judgment against any one. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defence which he might have to an action upon that contract.

In this action, therefore, brought by the receiver, in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defence, going to show that he was not liable upon his contract of subscription.

In each of the three cases last cited above, the defence of the statute of limitations was entertained and passed upon. *Hawkins v. Glenn*, 131 U. S. 332; *Glenn v. Liggett*, 135 U. S. 547; *Glenn v. Marbury*, 145 U. S. 506.

The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether the present defendant, or any other particular stockholder, was liable for anything, the Iowa court, by sustaining the defence of the statute of limitations, did not deny to the judicial proceeding of Illinois the full faith and credit to which it was entitled.¹

¹ The judgment of a foreign court levying the assessment is conclusive as to the validity of the assessment. *Hawkins v. Glenn*, 131 U. S. 319; *Lehman v. Glenn*, 87

OVERBY v. GORDON.

SUPREME COURT OF THE UNITED STATES. 1900.

[Reported 177 *United States*, 214.]

THE proceedings under review originated in the Supreme Court of the District of Columbia, by the filing in that court, on January 23, 1896, of a petition on behalf of Mrs. Gordon, the appellee herein. The object of the petition was to obtain the probate, as the last will and testament of Hugh A. Haralson, of a paper purporting to have been executed by Haralson, and to obtain a grant of letters of administration thereon, with the will annexed. It was averred that Haralson, at the time of his death and for several years prior thereto, had been a resident of the District of Columbia, and that he died on August 23, 1895, in the county of De Kalb, State of Georgia, possessed of personal property of the value of about ten thousand dollars, all of which, except an insignificant part thereof, was at the time in the District of Columbia.

At the trial the jury found that Haralson died domiciled in the District of Columbia, and left personal estate there.

A caveat was filed by other next of kin of Haralson contesting the validity of the alleged will and the domicile of the deceased in the District of Columbia. At the trial the caveators offered in evidence a certified transcript of record from the De Kalb Court of Ordinary, De Kalb County, in the State of Georgia. This record showed the appointment in May, 1896, of Logan Bleckley as administrator.

It is further recited in the bill of exceptions that the transcript referred to was offered as tending to show that the decedent had died a resident of De Kalb County, Georgia, intestate, "and that Mrs. Gordon was thereby estopped to deny that fact." The trial court, however, refused to admit the record in evidence, and an exception was duly taken to such refusal.

An order was entered admitting the will to probate and record as the last will and testament of the decedent, and letters of administration *cum testamento annexo* were decreed to issue to Hugh H. Gordon, a son of the petitioner. An appeal was thereupon taken by the caveators to the Court of Appeals of the District of Columbia. That court affirmed the order of the lower court (Mr. Chief Justice Alvey dissenting), (13 App. D. C. 392,) and a writ of error was then sued out from this court.¹

WHITE, J. . . . Was the grant of letters of administration by the

Ala. 618; Glenn v. Williams, 60 Md. 93; Mut. Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 66 N. W. 1095; Commonwealth Mut. Fire Ins. Co. v. Hayden, 60 Neb. 636, 83 N. W. 992; Parker v. Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751. — ED.

¹ The statement of facts is abridged, and part of the opinion is omitted. — ED.

Court of Ordinary of De Kalb County, Georgia, competent evidence upon the issue tried in the Supreme Court of the District of Columbia respecting the domicile of the decedent at the time of his death?

In determining this question it is important to keep in mind the following facts:—

At the time when the proceedings before the De Kalb court were instituted (April, 1896), the estate of the deceased, with but a trifling exception, was within the District of Columbia. Not only this, but upon the ground that the domicile of Haralson at his death was the District of Columbia, the jurisdiction of a competent court of the District had been invoked as early as January 23, 1896, for the probate of an alleged last will and testament of Haralson and for the grant of letters of administration *cum testamento annexo*; and on March 6, 1896, the next of kin, other than the proponent of the alleged will, had filed a caveat in said court of the District of Columbia contesting the application for probate and grant of letters. Four days before the certification of issues framed by reason of such contest, to be tried before a jury, the caveators before the Supreme Court of the District of Columbia initiated the proceedings before the De Kalb County Court. It was upon the hearing had in the Supreme Court of the District of Columbia upon the issues certified on April 10, 1896, that the adjudication of the De Kalb County Court was offered in evidence upon the issue in respect to the domicile of the decedent at his death. . . .

As said by this court in *Veach v. Rice*, 131 U. S. 298, courts of ordinary in Georgia are courts of record, having exclusive and general jurisdiction over the estates of decedents, and no question has been raised as to the observance of the requirements of the statutes of Georgia in the proceedings which culminated in the appointment of the Georgia administrator.

The transcript referred to, however, undoubtedly only justifies the inference that none other than the statutory notice by publication was given, and that no contest was had in respect to the grant of letters.

Jurisdiction is the right to hear and decide, and it must be exercised, speaking in a broad sense, in one of two modes, — either *in rem* or *in personam*.

It will be observed that the statutory notice above referred to was not required to be directed against named individuals, nor had it for its object the obtaining of specific relief against any one, but it was to be general, and its purpose was to warn all persons that it was proposed by the court of ordinary to determine whether a legal representative should be appointed to administer the property of the deceased within the State of Georgia. The notice and proceeding was obviously intended to have no greater force or efficacy against persons resident in the State of Georgia than against individuals who might be resident without the State. It results that the proceedings referred to were not intended to constitute and did not amount to an action *in personam*.

This results from the fact that they were devoid of the elements essential to an action *in personam*; and, if not proceedings purely *in rem*, they possessed so much of the characteristics thereof, as not to warrant the allowance of greater efficacy than is accorded to a proceeding of that nature.

An essential characteristic, however, of a proceeding *in rem* is that there must be a *res* or subject-matter upon which the court is to exercise its jurisdiction. In cases purely *in rem*, as in admiralty and revenue cases for the condemnation or forfeiture of specific property, a preliminary seizure of the property is necessary to the power of the court to adjudicate at all. In other cases, where the proceedings are in form *in personam*, but the court is unable to acquire jurisdiction of the person of the defendant, by actual or constructive service of process, the action may proceed, as one *in rem* against the property of which a preliminary seizure or its equivalent has been made; or, jurisdiction may be exercised without such preliminary seizure, where the relief sought is an adjudication respecting the title to or validity of alleged liens upon real estate situate within the jurisdiction of the court. *Roller v. Holly*, 176 U. S. 398. To the class of cases where the proceedings are in form *in rem* may be added those connected with the grant of letters either testamentary or of administration.

From the record of the proceedings instituted in the De Kalb County Court it is apparent that the ultimate purpose was to adjudicate upon and decree distribution of the estate of the deceased, the appointment of an administrator being a mere preliminary step in the management and control by the court of assets of the estate. The question of domicile would seem to have been important only as establishing the particular court of ordinary which was vested with jurisdiction to administer the assets within the State of Georgia. The subject-matter or *res*, upon which the power of the court was to be exercised, was, therefore, the estate of the decedent.

The sovereignty of the State of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the State. To quote the language of Mr. Chief Justice Marshall in *Rose v. Himely*, 4 Cranch, 241, 277:—

“It is repugnant to every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*.”

As said also in *Pennoyer v. Neff*, 95 U. S. 714, 722:—

“Except as restrained and limited by the Constitution, the several States of the Union possess and exercise the authority of independent States, and two well established principles of public law respecting the jurisdiction of an independent State over persons and property are applicable to them. One of these principles is, that every State pos-

sesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . .

“The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. (Story, *Confl. Laws*, c. 2; Wheat. *Int. Law*, pt. 2, c. 2.) The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. ‘Any exertion of authority of this sort beyond this limit,’ says Story, ‘is a mere nullity, and incapable of binding such persons or property in any other tribunals.’ Story, *Confl. Laws*, sect. 539.”

Now, it is undeniable that the sovereignty of the State of Georgia and the jurisdiction of its courts at the time of the adjudication by the De Kalb County Court, by the grant of letters of administration on the estate of Haralson, did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia, and, viewed as a step in a proceeding *in rem* relating to property within the jurisdiction of the court, the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the State of Georgia. The decisions in *Robertson v. Pickrell*, 109 U. S. 608, and in the cases there relied upon, furnish illustrations of this principle. Thus, in the case just named, it was held that the act of Congress declaring the force and efficacy which the records and judicial proceedings of one State should have in the courts of another State did not require that they should have any greater force and effect in another State than in the State where such records and judicial proceedings originated and were had; that the probate of a will in one State, by a proceeding not adversary in character, merely established its sufficiency to pass all property which could be transferred in that State by a valid instrument of that kind, and the validity of the will in that State; and that such probate did not conduce to establish the facts upon which the probate proceeded, in proceedings respecting real property situated in another State, except as permitted by the laws of such other State.

The reasoning upon which we base the conclusion that the transcript of record of the grant of letters by the De Kalb County Court was not entitled to probative force in the courts of another State in the controversy over the administration of assets not within the territorial jurisdiction of the State of Georgia, at the time the grant of letters was made, finds support in the opinion delivered by Lord Blackburn in *Concha v. Concha*, 11 App. Cas. p. 541, a case referred to in terms of approval in *Thormann v. Frame*, 176 U. S. 350, where was involved a controversy in some of its features analogous to that presented in the case at bar. The facts in the *Concha* case were as follows:—

After contest between a daughter of a decedent and the executors named in a document which purported to be a last will and testament, the paper was admitted to probate by a judge of a probate court in London, and he expressly decided, upon an issue framed in a contest between the daughter and executors as to the domicile of the decedent, in favor of the domicile being in England, and not in Chili, as was claimed by the daughter. In a subsequent action before the Court of Chancery for distribution of the assets, the daughter again sought to litigate the question as to the domicile of her father, and her right to do so was finally adjudicated by the House of Lords. The executors, or those who had succeeded them in the management of the administration suit, attempted to avail of the decree of the probate court as conclusive upon the question of domicile, first, as a proceeding *in rem*, which operated an estoppel against all the world; and, second, as a proceeding *inter partes*, operative as *res adjudicata*, by reason of the actual contest made by the daughter. The decree of the probate court, however, was held not conclusive *in rem* as to the domicile, because the finding as to domicile was not necessary to the decree of the judge of probate, nor conclusive *inter partes*, as the pending controversy was substantially between the daughter and the residuary legatee, and as the latter could not be bound by an adjudication upon a question not necessary to be litigated in the probate court, and as estoppels must be mutual, the daughter could not be bound. This decision of the House of Lords, it will be borne in mind, was as to the effect to be given in one judicial tribunal in England to the decision of another court of the same country. In the course of his opinion Lord Blackburn (who, perhaps had in mind doubts intimated in the Court of Appeals, 29 Ch. D. 268, 276, as to whether the findings on which a judgment *in rem* is based, are in all cases conclusive against the world) said (p. 562):—

“What he (the Probate Judge) did decide was (and to that extent I think the decision was conclusive on everybody), that there was an executor who was entitled to have probate in England for the purpose of getting in and taking the property which was in England, and to that he was entitled if there was a will which made that executor a good executor according to the law of England; but I do not think that Sir Creswell Creswell had any power to say that the testator was or was not really a domiciled Englishman. If he had been a domiciled American or domiciled in any other country, I do not think that a decision of the judge of our probate court, saying, ‘I find him to be a domiciled Englishman, and, therefore, on that account grant probate,’ would be at all conclusive upon the court of another country to oblige them to admit that he was a domiciled Englishman, when in fact he was not; or, putting it the converse way, that if a Chilian court had chosen to say that some very wealthy man was a domiciled Chilian, and had therefore granted probate, the law of nations would require that to conclude any person from saying in this country that he was not so.”

Again, after referring to the fact that upon the executor proposing to prove the will, a caveat was entered upon which it was said the probate judge entered into an inquiry whether or not the testator was domiciled in England, and found that he was, Lord Blackburn observed (p. 564) :—

“It is said that upon the caveat in the suit an order was drawn up, which may perhaps not mean that, but which does look extremely as if the registrar entered the judgment that the judge did find it. I cannot think that if he had done that it would have bound everybody universally as being a judgment *in rem*. I have instanced a sort of illustration of it. Supposing he had done so, and supposing that he was wrong, and the fact was that the testator had not been really domiciled in England, but had been domiciled, say, in the United States, in New York we will suppose, could it possibly have been said that the court of New York (which undoubtedly would have the same general law of nations as we have, following the law of the domicile to distribute the property) would have respected the decision of the Judge Ordinary, it establishing that this will was proved conclusively as being enough to make this person executor and the representative in England to obtain the English property—could it have been said that the Judge Ordinary having erroneously found that the testator was domiciled in England when in fact he was a domiciled citizen of the United States, it was to conclude them and conclude everybody to the fact that he was a domiciled Englishman until a foreigner had come to the court of this country to obtain a reversal? I cannot think so. If that was so, how could it as a matter *in rem* be decisive as regards the reason upon which the judge of the probate court had gone? I cannot think that it would be.”

In *Blackburn v. Crawford's Lessee*, 3 Wall. 175, and a continuation of the same action under the title of *Kearney v. Denn* (15 Wall. 51), the sole question at issue in the action (ejectment) was the validity of an asserted marriage. At the trial the defendant offered in evidence, as a conclusive estoppel against all the lessors of the plaintiff and as *prima facie* evidence to support the issue on his part, a transcript from the records of the Orphans' Court of Prince George's County, Maryland, and proposed to read therefrom the verdict of the jury and the order of the Orphans' Court thereon on certain issues sent from the Orphans' Court to the Circuit Court of said county. These issues had been framed upon a contest, initiated in the Orphans' Court, by one of the lessors of the plaintiff who resisted an application of Blackburn for the grant to him of letters of administration on the estate of a certain intestate, such lessor asserting that he was nearest of kin to the intestate, and that letters should be granted to him. The verdict in the contest was against the validity of the claimed marriage. On the trial in the action in ejectment the jury found in favor of the fact of marriage. This court—the trial judge in the action in ejectment having excluded the transcript referred to—held that the decree upon the

contest was competent evidence and operated an estoppel as against the lessor of the plaintiff who was a party to the contest, but that the adjudication did not affect the other lessors, who were not parties to such contest. Obviously, the decision proceeded upon the assumption that as the Orphans' Court possessed no general jurisdiction over the real estate of a decedent, its action upon the application for grant of letters, regarded as a proceeding *in rem*, possessed no probative force in contests over such property. This, of course, in nowise impugned the principle that all parties to a contest, in proceedings in a probate court preliminary to and during the course of administration upon the estate of the decedent, upon a matter within the jurisdiction of the court, are concluded in every other court by the decision rendered, as to the facts upon which such decision necessarily proceeded. *Caujolle v. Ferrié*, 13 Wall. 465. And see *Butterfield v. Smith*, 101 U. S. 570.

We are of the opinion that the De Kalb County Court possessed the power to determine the question of domicile of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicile, by a mere finding of such a fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such a contest as to facts which had been or might have been litigated in such contest.

Our conclusion being that the adjudication of the fact of domicile in Georgia made in the grant of letters by the De Kalb County Court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicile in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the Supreme Court of the District did not err in excluding the transcript in question, whether tendered as evidence conducing to establish or as conclusively fixing the domicile of the deceased. And this conclusion is not affected in the least by the circumstance that on the trial of the issue as to domicile had in the Supreme Court of the District of Columbia it was claimed that the assets within the District of Columbia at the time of the filing of the caveat by the next of kin had been thereafter, without the sanction of the court, removed from the District of Columbia by one of the caveators. The trial court properly declined to rule that delivery of such assets operated to protect those who made the surrender, as against an administrator appointed within the District, subsequent, it is true, to such delivery, but as the result of proceedings for the appointment of an administrator which were pending in a proper court of the District at the time of the delivery, and when the person in whose name the Georgia letters were issued was a party to the proceedings previously instituted and then pending in the District. Nor

was the trial court required to determine that upon proper application to the Georgia court the administrator appointed by the court would not be ordered to deliver up the assets removed by him from the District.

Allusion has been made to an act of Congress of February 28, 1887, c. 281, 24 Stat. 431, which makes it lawful for any person or persons to whom letters testamentary or of administration may be granted by proper authority, in any of the United States or the Territories thereof, to maintain any suit or action and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said District. We do not construe that statute, however, as having any relation to a case of the kind we are now considering. In other words, the statute cannot in reason be interpreted as directing that where a proper court of the District of Columbia had obtained jurisdiction by proceedings commenced before it for administration upon property within the District, it should be obliged to dismiss such proceedings because one who was a party before it chose, whilst issues in such proceedings were pending and undecided, to go to a State and there make application for letters of administration, basing such application upon the asserted fact that the deceased had been domiciled in such State.

Whilst it may be conceded that, in consequence of the statute, as a general rule, a debtor residing in the District of Columbia, of a deceased person, may be protected in making payment to an administrator appointed in another jurisdiction, the asserted domicile of the deceased (*Wilkins v. Ellett*, 108 U. S. 256), this does not make it necessary for us to decide that the payment or delivery of the assets in the District of Columbia, which was made to the Georgia administrator after the commencement of proceedings for the administration of the assets within the District of Columbia, based upon the ground of the domicile of the deceased having been in said District, was lawful. To determine this question would involve a consideration of other provisions of the statute, and as to whether the person making the payment was or not to be charged with notice of the then pending proceedings in the Supreme Court of the District, which, of course, were matter of public record. The question, however, is not before us for review, and we do not, therefore, express an opinion in regard thereto.

Further, in the light of the decision of the Supreme Court of Georgia in the case of *Thomas v. Morrisett*, 76 Ga. 384, and an analogous decision by the Supreme Court of Errors of Connecticut, in *Willetts Appeal from Probate*, 50 Conn. 330, it would seem altogether probable that the De Kalb County Court, upon application made to it, will order its appointee to surrender to the administrator appointed in the District of Columbia the assets which were by the former removed from the District during the pendency therein of the proceedings for administration.

Finding no error in the record, the judgment of the Court of Appeals of the District of Columbia is

*Affirmed.*¹

Mr. Justice BROWN concurred in the result.

CLARKE v. CLARKE.

SUPREME COURT OF THE UNITED STATES. 1900.

[Reported 178 *United States*, 186.]

WHITE, J. The Supreme Court of Errors of Connecticut held that the will of Julia H. Clarke, wife of the plaintiff in error, did not at the time of her death work an equitable conversion into personalty of the real estate situated in the State of Connecticut, and consequently, that though personal property might be governed by the law of the domicil, real estate within Connecticut was controlled by the law of Connecticut, and hence that Nancy B. Clarke, as surviving sister of Julia Clarke, inherited, under the laws of Connecticut, to the exclusion of the father, the interest of the deceased sister Julia in the real estate in Connecticut which had passed to Julia by the will of her mother. It is assigned as error that in so deciding the Connecticut court refused full faith and credit to the decree of the courts of South Carolina, wherein it was adjudged that the will of Mrs. Clarke had the effect of converting her real estate, *wherever situated*, into personalty; the deduction being that as under the South Carolina decision the real estate situated in Connecticut became personal property, it was the duty of the Connecticut court to have decided that the land passed by the law of South Carolina and not according to the law of Connecticut, and hence, that instead of treating the daughter Nancy as the owner of the whole of the real estate, it should have recognized the father as having a half interest therein. And the correctness of this proposition is really the only question which the assignment of errors presents for our decision.

The argument at bar has taken a wide range, and the various legal principles by which it was deemed that a solution of the controversy might be facilitated have been supported by a very elaborate reference to authority. We do not deem it necessary, however, to critically review the cases cited and the observations of text writers which were relied on in argument, nor to analyze all the contentions which it is

¹ *Acc. In re Gaines*, 84 Hun, 520; *Bowen v. Johnson*, 5 R. I. 112.

A decree by the proper court of the testator's domicil that a will is valid should have force everywhere. *Succession of Gaines*, 45 La. Ann. 1237; *Dalrymple v. Gamble*, 68 Md. 523. But see *Bowen v. Johnson*, 5 R. I. 112. So a determination of the proper distributees by such a court binds all other courts. *In re Trufort*, 36 Ch. D. 600; *Ennis v. Smith*, 14 How. 400, 430. So of a decision that a will creates a trust. *Smith v. Central Trust Co.*, 154 N. Y. 333; 48 N. E. 553. — Ed.

asserted those authorities sustain. We say this, because, in our opinion, the matter at issue may be disposed of by the application of two well defined and elementary legal principles.

It is a doctrine firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy. This familiar rule has been frequently declared by this court, a recent statement thereof being contained in the opinion delivered in *De Vaughn v. Hutchinson*, 165 U. S. 566, where the court said (p. 570) :—

“ It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. *United States v. Crosby*, 7 Cranch, 115 ; *Clark v. Graham*, 6 Wheat. 577 ; *McGoon v. Scales*, 9 Wall. 23 ; *Brine v. Insurance Co.*, 96 U. S. 627.”

Now, in the case at bar, the courts of Connecticut, construing the will of Mrs. Clarke, have declared that, by the law of Connecticut, land situated in that State, owned by Mrs. Clarke at her decease, continued to be, after her death, real estate for the purpose of devolution of title thereto. The proposition relied on, therefore, is this, although the court of last resort of Connecticut (declaring the law of that State) has held that the real estate in question had not become personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut where the real estate is situated governs in such a case. It is conceded that, had the will been presented to the courts of Connecticut in the first instance and rights been asserted under it, the operative force of its provisions upon real estate in Connecticut would have been within the control of such courts. But it is said a different rule must be applied where the will has been presented to a South Carolina court and a construction has been there given to it ; for, in such a case, not the will but the decree of the South Carolina court, construing the will, is the measure of the rights of the parties, as to real estate in Connecticut. The proposition, when truly comprehended, amounts but to the contention that the laws of the respective States controlling the transmission of real property by will, or in case of intestacy, are operative only, so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate. This is but to contend that what cannot be done directly can be accomplished by indirection, and that the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the non-existence of a decree of a court of another sovereignty de-

termining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time. These conclusions are not escaped by saying that it is not the law of Connecticut which conflicts with the interpretation of the will adopted by the South Carolina court, but the decision of the court of Connecticut which does so. In this forum, the local law of Connecticut as to real estate is the law of that State as announced by the court of last resort of that State.

As correctly observed in the course of the opinion delivered by the Supreme Court of Errors of Connecticut, the question as to the operative effect of the will of Mrs. Clarke, upon the status of land situated in Connecticut, was one directly involving the mode of passing title to lands in that State. This resulted from the fact that if the will worked a conversion into personalty immediately upon the death of Mrs. Clarke, as contended, it necessarily vested her executor with authority at once to sell and convey the real estate in Connecticut by a deed sufficient, under the laws of that State; to transfer title to real estate — a power which was held by the courts of Connecticut not to have been conferred. Had the executor assumed to exercise such a power, however, the validity or invalidity of a conveyance thus executed would have been one exclusively for the courts of Connecticut to determine, just as would have been the question of the sufficiency of the will to vest title. Such being the case, there is no basis for the contention that it was not the exclusive province of the courts of Connecticut to determine, prior to the execution of such a conveyance, whether or not the power to do so existed.

As further observed by the Connecticut court, whether Mr. Clarke, as executor and trustee under the will of his wife, had any power, duty, or estate with respect to lands situated in Connecticut, depended upon the laws of that State. The courts of the domicile of Mrs. Clarke could properly be called upon to construe her will so far as it affected property which was within or might properly come under the jurisdiction of those tribunals. If, however, by the law as enforced in Connecticut, land in Connecticut owned by Mrs. Clarke at her decease was real estate for all purposes, despite the provisions contained in her will, that land was a subject-matter not directly amenable to the jurisdiction of the courts of another State, however much those courts might indirectly affect and operate upon it in controversies, where the court, by reason of its jurisdiction over persons and the nature of the controversy, might coerce the execution of a conveyance of or other instrument incumbering such land.

And the cogency of the reasons just given is further demonstrated by considering the case from another though somewhat similar aspect. The decree of the South Carolina court, which, it is contended, had the effect of converting real estate situated in Connecticut into personal property, was not one rendered between persons who were *sui juris*.

Nancy B. Clarke, one of the parties to the suit in South Carolina, and whom the Connecticut court has held inherited, to the exclusion of the father, under the laws of Connecticut, the whole of the real estate belonging to her sister, was a minor. She was therefore incompetent, in the proceedings in South Carolina, to stand in judgment for the purpose of depriving herself of the rights which belonged to her under the law of Connecticut as to the real estate within that State. Neither the executor or trustee under the will, or the guardian *ad litem*, or any other person assuming to represent the minor in South Carolina, had authority to act for her *quo ad* her interest in real estate beyond the jurisdiction of the South Carolina court, and which was situated in Connecticut.

It cannot be doubted that the courts of a State where real estate is situated have the exclusive right to appoint a guardian of a non-resident minor, and vest in such guardian the exclusive control and management of land belonging to said minor, situated within the State. This court had occasion to consider and pass upon this doctrine in the case of *Hoyt v. Sprague*, 103 U. S. 613, and, in the course of the opinion, it was said (p. 631):—

“One of the ordinary rules of comity exercised by some European States is to acknowledge the authority and power of foreign guardians, that is, guardians of minors and others appointed under the laws of their domicile in other States. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate it is entirely disallowed; and is rarely admitted in regard to personal property. Justice Story, speaking of a decision which favored the extraterritorial power of a guardian in reference to personal property, says: ‘It has certainly not received any sanction in America, in the States acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators.’ Story, *Conf. Laws*, §§ 499, 504, 504 *a*. And see Wharton, *Conf. Laws*, §§ 259–268, 2d ed.; 3 Burge, *Colon. & For. Laws*, 1011. And some of those foreign jurists who contend most strongly for the general application of the ward’s *lex domicilii* admit that, when it comes to the alienation of foreign assets, an exception is to be made in favor of the jurisdiction within which the property is situate, for the reason that this concerns the ward’s property, and not his person. Wharton, §§ 267, 268.”

Of what efficacy, however, would be the power of one State to control the administration, through its own courts, of real estate within the State, belonging to minors, without regard to the domicile of the minor, if all such real estate could be disposed of and the administration thereof be controlled by the decree of the court of another State. Here, again, the argument relied on must rest upon the false assump-

tion that an exclusive power which confessedly exists in the courts of one jurisdiction may be wholly destroyed or rendered nugatory by the action of the courts of another jurisdiction in whom is vested no authority whatever on the subject. It results that no person before the South Carolina court, assuming to speak for the estate of Nancy B. Clarke, represented any real property of said Nancy which was not within the territorial jurisdiction of South Carolina, and the decree, therefore, could not affect land in Connecticut, an interest which was not before the court.

When, therefore, Henry P. Clarke, as administrator, appointed in Connecticut, of the estate of his deceased daughter, Julia Clarke, applied to the Connecticut probate court to determine who was entitled to the "real estate" owned by the intestate, it was the province of the Connecticut court to decide such question solely with reference to the law of Connecticut. Its power in this regard was not limited by the fact that in order to determine who owned the real estate, it was necessary for the court to construe the will of the mother of the intestate, and to determine what effect it had upon the status of the real estate under the law of Connecticut. Having a right to decide these questions, it was not constrained to adopt the construction of the will which had been announced by the court of South Carolina. From these conclusions it follows that because the court of Connecticut applied the law of that State in determining the devolution of title to real estate there situated, thereby no violation of the constitutional requirement that full faith and credit must be given in one State to the judgments and decrees of the courts of another State, was brought about, as the decree of the South Carolina court, in the particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a want of jurisdiction in the court of South Carolina over the particular subject-matter which was sought to be concluded in Connecticut by such decree. *Thompson v. Whitman*, 18 Wall. 457; *Cole v. Cunningham*, 133 U. S. 107; *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287; *Simmons v. Saul*, 138 U. S. 439; *Reynolds v. Stockton*, 140 U. S. 254; *Cooper v. Newell*, 173 U. S. 555.

Judgment affirmed.

LA SOCIÉTÉ DE NAVIGATION FRAISSINET ET
COMPAGNIE *v.* NAVILLE.

COURT OF APPEAL OF GALATZ (ROUMANIA). 1898.

[*Reported 27 Clunet*, 1037.]

A. NAVILLE, a distiller of liquors at Tecuci, Roumania, had shipped a quantity of liquors by la Société de Navigation Fraissinet et Cie of Marseilles. A serious damage happened in transit to the goods

shipped. Naville before the Tribunal of Bordeaux sued the railway company, which in its turn vouched to warranty la Société Fraissinet et Cie, because the damage happened during the sea carriage. The Tribunal and the Court of Bordeaux, holding the limitation of liability in the contract of carriage null, gave judgment for Naville, and condemned la Société Fraissinet et Cie. The company, having paid the judgment, appealed to the Court of Cassation, which held the limitation of liability valid and sent the suit back to the Court of Agen, which, in conformity with the opinion of the Court of Cassation, dismissed the action of Naville et Cie and gave judgment for la Société Fraissinet et Cie. The latter brought suit in the Tribunal of Tecuci to recover the amount paid (7,033 francs), and on appeal to the Court of Appeal of Galatz, the court rendered a judgment in favor of Naville against la Société Fraissinet et Cie.

THE COURT.¹ The defendant Naville claims that the judgment of the Court of Agen cannot be set up against him because he was not regularly served with process when the judgment was pronounced, and also because the judgments of French courts have not the force of *res judicata* with us, since there is no treaty of reciprocity in this matter between France and Roumania. . . .

According to article 374 of the Code of Civil Procedure, judgments pronounced in a foreign country can be executed in Roumania only in the manner and within the limits in which in that foreign country the decisions of Roumanian judges are executed, after being declared executory by the competent judges. There now exists between the Kingdom of Roumania and the Republic of France no treaty for the reciprocal execution of judicial decisions pronounced in the two States, and in fact these judgments are not executed. The decisions of the French court which have been referred to have no legal force with us, and consequently la Société Fraissinet et Cie cannot rely upon any of them to prove before the courts of Roumania that Naville detains without legal excuse the sum claimed; it therefore remains for us to determine for ourselves whether Naville legally detains this sum.²

¹ Part only of the opinion is given. — ED.

² The court held that Naville's claim was legally justified, and therefore that he rightfully retained the amount paid him by the Navigation Company.

STATESCU, J., dissented from the decision. While agreeing with the majority in their statement of the law, he held that the plaintiff was not relying on a foreign judgment, but that the defendant was doing so to justify himself in retaining the amount paid to him.

"One must not confound the executory force and the authority of a judgment with the *res judicata*. The latter has its source in the power of the judge to end the dispute submitted to him, that is, his jurisdiction. The former is given him by the law and the judicial power of the country where the judgment is to be put in execution. The authority of *res judicata* belongs in fact to a foreign judgment. Though it has not full executory force outside the limits of the State where it was pronounced, it nevertheless constitutes, in favor of the party who has obtained it, a right which can be set up in any country against the other party. This necessarily results from the judicial contract entered into by parties to lawsuits. To decide otherwise would be to yield to old

SECTION IV.

THE EFFECT OF A JUDGMENT ON PROPERTY.

HUGHES v. CORNELIUS.

KING'S BENCH. 1680.

[Reported 2 Shower, 232.]

TROVER brought for a ship and goods, and on a special verdict there is found a sentence in the Admiralty Court in France, which was with the defendant.

And now *per Curiam* agreed and adjudged, that as we are to take notice of a sentence in the admiralty here, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition; for suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this? It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars. If you are aggrieved you must apply yourself to the king and council; it being a matter of government he will recommend it to his liege ambassador if he see cause; and if not remedied, he may grant letters of marque and reprisal.

And this case was so resolved by all the Court upon solemn debate; this being of an English ship taken by the French, and as a Dutch ship in time of war between the Dutch and the French.

Judgment for the defendants.

CASTRIQUE v. IMRIE.

HOUSE OF LORDS. 1870.

[Reported Law Reports, 4 House of Lords, 414.]

THE ship "Ann Martin," of Liverpool, Benson, master, was supplied with necessaries at Melbourne by Messrs. Levien & Stenetz. Benson drew a bill in payment on Claus, then the owner, for the sum of £601 16s. 6d. Claus became bankrupt, and the bill was dishonored: the ves-

theories now banished from the Italian law; theories which, exaggerating the principle of the reciprocal independence of nations, resulted in the denial of any kind of force to every judgment beyond the boundaries of the State where it was pronounced." Court of Messina, Aug. 20, 1884. 12 Clunet, 453. — Ed.

sel had meanwhile been transferred to Castrique, and the bill had been indorsed to Messrs. Trotteaux & Co., of Havre. The vessel being in Havre, Messrs. Trotteaux & Co. commenced in the Tribunal of Commerce there, a suit against Benson on the bill. Benson was cited and appeared, but did not defend the suit. Judgment was given against Benson as master "and by privilege on that vessel" to pay the amount. The ship was seized upon the judgment, but could not be sold till the judgment was ratified by the Civil Tribunal of the same district. That court confirmed the judgment, and, after hearing the parties interested and receiving evidence of the law of England, refused to modify its action. The Court of Appeal of Rouen affirmed the action of the Civil Tribunal of Havre. A sale of the vessel was made under order of court, and the defendant, an Englishman, became the purchaser. Upon his bringing the vessel to England, Castrique brought an action in the Court of Common Pleas to recover it, on the ground that the sale in France was illegal and void as against his earlier title. The Court of Common Pleas gave judgment for Castrique; this was reversed in the Court of Exchequer Chamber. The case was then brought up to this House on error. The judges were summoned.¹

BLACKBURN, J. My Lords, I have the honor to deliver the joint opinion of my Brothers BRAMWELL, MELLOR, BRETT, CLEASBY, and myself.² . . .

What were the nature and effect of the proceedings in France — what jurisdiction the courts there had? and what the effect of their determinations really was? are all questions depending on the French law, and it must be ascertained as a fact what that French law is. When once that fact is ascertained, it becomes a question of English law to determine what effect is to be given to it in an English court.

In the present case the parties at the trial agreed upon a statement of the facts, and gave the court authority to draw inferences from them; but, unfortunately, they have stated the facts as to the French law very imperfectly, and the result has been that the Court of Common Pleas has drawn one inference as to the French law, and the Court of Exchequer Chamber has drawn another. It is very possible that a French lawyer may justly say that neither is right; it is quite certain that both cannot be. It is now for your Lordships to determine what the proper inference is, and on that point we must express our opinion. It is quite possible that the inference we draw may not be the correct one, but we apprehend that all that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to it which is available, and *bonâ fide* to determine on that, as well as it can, what the foreign law is. If from the imperfect evidence produced before it, or its misapprehension of the

¹ This statement of facts is condensed from that of the Reporter. — ED.

² Part of this advisory opinion is omitted. KEATING, J., delivered an advisory opinion concurring in result. — ED.

effect of that evidence, a mistake is made, it is much to be lamented, but the tribunal is free from blame.

We think that some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties, and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the courts of common law in England are of this nature, and it is every day's experience that where the sheriff, under a *fieri facias* against A., has sold a particular chattel, B. may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the courts of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different.

It is not essential that there should be an actual adjudication on the status of the thing. Our Courts of Admiralty, when property is attached and in their hands, on a proper case, being shown that it is perishable, order that it shall be sold and the proceeds paid into court to abide the event of the litigation. It is almost essential to justice that such a power should exist in every case where property, at all events perishable property, is detained.

In a recent case of *Stringer v. English and Scottish Marine Insurance Company*, in the Queen's Bench, Law Rep. 4 Q. B. 676, it appeared that the American Prize Court, *pendente lite*, ordered a valuable cargo, which was claimed as prize, to be sold, and that not only without any adjudication that it was a prize, but although the decision of the court below had been against the captors, and that decision was ultimately affirmed on appeal. We apprehend that it is clear that in all such cases courts sitting under the same authority must recognize the title of the purchaser as valid. In Story on the Conflict of Laws, § 592, it is said that the principle that the judgment is conclusive "is applied to all proceedings *in rem* as to movable property within the jurisdiction of the court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign

tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such courts have a rightful jurisdiction founded in the actual or constructive possession of the subject-matter."

We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from Story. We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world. . . .

LORD HATHERLEY, Lord Chancellor.¹ The question which really arises before us is this, whether or not the judgment of the French court, and the consequent sale had in pursuance of that judgment, must be treated as having changed the property of the ship. The ship was bought at that auction by a person who was a British subject, and who came here and registered himself as the owner of the vessel, and is now represented by the defendant. The question is, as to the property of the ship as between Castrique and the defendant.

We have been assisted with the opinions of the learned judges in this case, and I entirely concur in the conclusion at which they have arrived. It appears to me, in the first place, desirable to consider whether this judgment must be taken as a judgment by the French court *in rem*, or whether it is to be taken as a judgment purporting only to deal with the interest in the vessel, whatever that interest might be, of Benson, who was the debtor in the action on the bill, and as giving no further or other right than such interest as Benson had. As it was stated by the learned judges, we are familiar in our law with that distinction; we are familiar with the course taken by the Court of Admiralty in proceedings against a ship, selling a ship, and giving a title against all third persons who become purchasers under a decree of that court; we are familiar also with the course taken by our own courts of law in decreeing judgment of any property of a debtor taken by levy upon his goods, in which case the interest of the debtor in the chattel is sold, and that interest alone, and no further or other right than that possessed by the debtor, can be transferred to persons purchasing under that sale. In other words, they purchase simply the interest of the debtor in that chattel.

¹ Part of this opinion, and the concurring opinions of Lords CHELMSFORD and COLONSAY, are omitted.—ED.

If we look at the course of proceedings to see what were the intent and purpose and duty of the French courts, and if we ask did they proceed in this course which they took in directing the sale of the vessel as against the vessel itself, we find that there has been a difference of opinion upon that point between the Court of Common Pleas and the Court of Exchequer Chamber. The Court of Common Pleas thought that it was not a proceeding against the ship itself, but simply against such interest as the debtor had therein, while the Court of Exchequer Chamber came to the conclusion that it was a proceeding against the ship itself. Now, I entirely concur in the remarks of the learned judges who have assisted us in this case, that, unfortunately, the case being one of foreign law, which we must consider as a fact laid before us, it has not been stated in the special case, with all the clearness which would have been desirable, what that law is. But what is there stated it appears to me is sufficient to indicate upon the whole the course taken by the French courts and the grounds of their proceeding. In the first place, it was a proceeding against Benson and the ship which originated the matter. That being so, I think that it would be very difficult to say that a proceeding *in rem* was not one of the matters contemplated in the original judgment. The judgment of the Tribunal of Commerce was a judgment against Benson. He had desired not to be made personally liable, as the expression here is, in respect of this judgment, and it was given against him "by privilege upon the ship." The ship was then directed to be sold. A good deal of argument turned upon that expression, "by privilege upon the ship." The case was argued extremely ably by Mr. Matthews at your Lordships' bar. He put the case to us thus: What was meant was no more than this, that when the ship should be sold the captain, by virtue of the French law, would be a privileged creditor, and would be entitled to be paid out of the first proceeds of the sale, but that it did not necessarily follow from this circumstance that the sale was ordered to be made as against all persons having an interest in the ship. He put it in this way, that it might be treated as if the court had regarded the whole matter thus: that he, Benson, would have a certain amount of interest in the ship by virtue of such privilege as he might have, and the court might merely mean to sell all such amount of interest as Benson had, and therefore to dispose only of those rights which he possessed in priority to others, and to the amount which might be due to him as captain in respect of any claim he had in that capacity upon the ship; in other words, to sell exactly what was due to Benson as captain, and not to sell the ship, *per se*, for any other purpose whatever.

But, as was well observed by the learned judges, in the first place this privilege could only arise after the sale of the ship had taken place to give him a priority over other creditors interested in disposing of the vessel. But further than that, regard being had to the original proceeding, being a proceeding against Benson and the ship, and Ben-

son himself being excluded from any personal liability, and the judgment against him being by privilege upon the ship, it does appear to me that the word "privilege," as used here, is used much more in the sense in which it is used by Lord Tenterden in his work upon shipping, of a charge upon a vessel which the person is entitled to realize by sale, than in the sense of saying simply that amongst all the several persons who may have claims when the ship comes to be sold, Benson is to stand in a favored position. In other words, the French court intended by the proceeding taken to adjudge the sale of the vessel in order to satisfy this privilege.

But, beyond that, I think the case becomes somewhat clearer when it is carried to the Civil Tribunal, which was called upon to affirm the judgment of the Tribunal of Commerce, and give efficacy to the dealing with the ship. What course did the Civil Tribunal take? It summoned all who were supposed to be the owners of the ship. The judges of that court only knew of Claus and Claus's assignee — they did not know any of the mortgagees whose titles did not appear upon the ship's papers; at all events, they considered, if anything was said about them, that they could pay no attention to persons of whom they could have no knowledge except through the medium of the ship's papers. For what purpose did they call Claus and his assignee? For the purpose of making them liable upon the bill, not because Claus had accepted it, but only because, being interested in the thing they were about to sell, they thought it right that Claus and his assignee should be present.

Therefore, upon the whole proceeding, taking first the proceeding against Benson and the ship, next, the detainer of the vessel by the Tribunal of Commerce for the purpose of the sale being affirmed by the Superior Court, and then the Superior Court when it arrives at the question of sale or no sale, taking care to summon those whom alone it could recognize as owners, I think there can be no doubt that the judgment of the court was intended to be a judgment *in rem*, and therefore the court intended to do that which by the French law it did, namely, to transfer the ownership in the vessel.

That being so, the only remaining point is this: it is said that the French judges decided against our English law; that the effect of our law was laid before them, and that they disregarded it and determined the case contrary to what the law of this country would be. It is said that the law of the flag should have governed the decision of the French courts with reference to this vessel, and therefore, the courts having come to an erroneous conclusion, the judgment that they erroneously gave and so acted upon would not here confer a title upon those who in France undoubtedly, under that judgment, did acquire it.

Now, my Lords, without expressing any opinion (for I purposely wish to avoid doing so) with reference to a decision of my own which has been cited, in the case of *Simpson v. Fogo*, 1 Jo. & H. 18; 1 H. & M. 195, as to what might be done in the case of a court wilfully deter-

mining that it will not, according to the usual comity, recognize the law of other nations when clearly and plainly put before it, without saying anything as to what would justify the courts in our own country in hesitating to give effect to a foreign judgment if obtained by fraud or misrepresentation, it is enough for me to say upon the present occasion, that, in this case, the whole of the facts appear to have been inquired into by the French courts judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in France in deciding as they did decide. That decision confirmed the title by sale to the person who became the purchaser at the sale. According to the law of France that title could not be thereafter disputed or disturbed, the court at Rouen being the highest court having jurisdiction in the matter.

That being so, there being neither a case of refusal to attend or listen to anything that might be said to them with reference to our own law, nor to adopt that as the ground of their conclusion, and there being no case, as far as I know, of any fraudulent representation or concealment with reference to any facts in the case, and the decision having been come to and pronounced, not, as in one of the cases which was cited, in the absence of the parties, but in Castrique's own suit, where he had every opportunity of bringing forward his own case, the decision cannot be complained of as one contrary to justice through its being pronounced in the absence, from want of citation, of any of the parties interested, I therefore think we are bound to give effect to the conclusion arrived at by the French court, and to the title derived through the medium of that conclusion, and that the court of Exchequer Chamber was right in the decision to which it came. And, therefore, I have to submit to your Lordships that the decision of the Court of Exchequer Chamber ought to be affirmed.

Judgment of Court of Exchequer Chamber affirmed.

THE CITY OF MECCA.

COURT OF APPEAL. 1881.

[*Reported 6 Probate Division, 106.*]

In the early part of January, 1875, a collision took place off the Portuguese coast between the British ship "City of Mecca" and a Portuguese ship called the "Isulano," on which an action was brought in the Portuguese court. Subsequently, in the year 1879, an action was brought in the Admiralty Court in England, on which this present appeal has been commenced, and when the writ was issued it was indorsed as a claim upon a judgment of the Tribunal of Commerce of Lisbon, and the plaintiffs claimed £25,000. That judgment of the Tribunal of Com-

merce at Lisbon was a judgment pronounced on the 17th of December, 1876, which condemned the defendants the owners of the "City of Mecca" jointly and severally to pay to the plaintiffs the amount claimed with interest.¹

JESSEL, M.R. By the law of Portugal there is no such thing as an action *in rem* — it does not exist at all. What the reason may be is immaterial to inquire, and the reason given is certainly a very odd one, but the fact is quite plain. This is what is said by a gentleman of great eminence in Portugal — a Portuguese advocate and president of the Association of Advocates in Lisbon, and he has practised as an advocate since 1840, and he says, "That modern Portuguese law does not accept in terms the distinction of actions *in rem* and *in personam*, because Portuguese laws deal little in doctrine." Whether that reason is satisfactory to his mind or not, I do not know. I am afraid it is not satisfactory to mine. That being so, the course of procedure seems to be this: They bring a personal action against the owners and the captain who are liable for the collision, and when they have got judgment in that action, if the owners and captain do not pay, and if the vessel after the judgment comes within the jurisdiction of the Portuguese court, they enforce their personal judgment as against the vessel under the doctrine of the law of nations, which is stated by the two advocates who have made affidavits to be part of the law of Portugal, that damage arising from collision gives a maritime lien on the vessel which is in fault, and that the lien dates from the time of collision, and of course is not created by the judgment, which merely ascertains the amount of the damage and also decides, if that is disputed, whether there is any lien at all, whether there is any fault or liability on the part of the vessel. That being so, the judgment in this case was given actually against the captain and owners by name and there is no other judgment, and the present action is brought on that judgment and on that judgment only. There was in reality in Portugal an attempt to seize the vessel by arrest, which attempt failed, because, as I have already said, the Portuguese law does not allow the arrest of a vessel before the damage is ascertained, and therefore the embargo, as it is called, was discharged and there was no arrest of the vessel, nor does it appear that it has since come within the jurisdiction of the court of Portugal, nor is there any maritime lien or order directing a charge on the vessel or directing the sale of the vessel.

It appears to us clear that this judgment is a personal judgment in a personal action. Then it may be said, What is there to argue? The argument presented to us by the respondents is this — First of all it is alleged that the action in Portugal was an action for enforcing a maritime lien; secondly, that whatever the terms of the judgment might be, it was a judgment for enforcing a maritime lien and a judgment *in*

¹ This statement of facts is from the opinion of BAGGALLAY, L.J. Part of the opinion of JESSEL, M.R., and the concurring opinions, of BAGGALLAY, L.J., and LUSH, J., are omitted. — Ed.

rem, and that being so, it was a judgment binding the vessel in the courts of every civilized country under the international law. But I find the simple answer is that it is not an action or proceeding to enforce a maritime lien — nothing of the kind appears on the proceedings. There is no suggestion from beginning to end that the ship is liable; there is no declaration that the ship is liable, and it does not appear on the proceedings that the ship was even within the jurisdiction at the time the action was commenced against the owners. An action for enforcing a maritime lien may no doubt be commenced without an actual arrest of the ship, but there is no suggestion that they intended anything of the kind, and, in fact, the law does not allow it. An action against a ship, as it is called, is not allowed by the law of Portugal. You may in England and in most countries proceed against the ship. The writ may be issued against the owner of such a ship, and the owner may never appear, and you get your judgment against the ship without a single person being named from beginning to end. That is an action *in rem*, and it is perfectly well understood that the judgment is against the ship. In the present case the judgment does not affect the ship at all, unless the ship should afterwards come within the jurisdiction of the Portuguese court, and then it can be made a proceeding by which you can afterwards arrest the ship and get it condemned. Therefore, it seems to me to be plain that this is a personal action as distinguished from an action, *in rem*, and it is nothing more or less; and any attempt to make it out something else (because the law of Portugal does not allow actions *in rem*) is really to change the real nature of the action to meet the exigencies of those who want to make the judgment of the court of Portugal go further than it really does. It appears to me, therefore, we have not now the same state of circumstances as that on which the judge in the court below decided, for there was no action, or *in rem*, judgment *in rem*, either in form or substance.

MINNA CRAIG STEAMSHIP CO. v. CHARTERED
MERCANTILE BANK OF INDIA.

COURT OF APPEAL. 1897.

[Reported [1897] 1 *Queen's Bench*, 460.]

LORD ESHER, M.R. In this case the liquidator of the plaintiff company, which is being wound up, has in the name of the company brought an action against the defendants for money had and received — that is to say, an action in which it is asserted that the defendants have in their hands money which, in law or in equity, they ought to pay over to the plaintiffs. The facts are as follows. The company

were the owners of a ship. The ship being at Bombay loading cargo for a voyage to Hamburg, the captain by fraudulent representations was induced to do that which according to English law he had no authority as against the owners to do — namely, to sign bills of lading for goods which were not on board the ship. If proceedings had been taken in this country, the shipowners would not have been bound by the signature of such bills of lading by the captain. The defendants became holders for value of the bills of lading. Upon the arrival of the ship at Hamburg a suit was commenced by the defendants in the German court there, and the first question which arises was whether this suit was an action *in rem* or not. It is contended for the plaintiffs that it was not. There is no doubt that it was commenced in the manner appropriate to a proceeding *in rem* — namely, by arrest of the ship. After the arrest the proceedings were continued, and, upon its being shown that the captain had signed the bills of lading of which the defendants were the holders, it was held by the German court that, that being so, the owners of the ship could not deny that the goods had been shipped on board, and there was therefore no answer to the claim of the defendants in respect of the non-delivery of the goods. Thereupon the court, proceeding in the manner appropriate to an action *in rem*, condemned the ship; and, the ship having been sold, the proceeds of the sale were paid into court; and the court subsequently ordered the sum of £10,944 to be paid to the defendants out of the money in court in satisfaction of their claim. Every step in the proceedings so taken in the German court appears to me to have been in accordance with the procedure in an action *in rem*, and not in accordance with the procedure in an action *in personam*. I therefore think it obvious that the German court, in what they did, assumed to be acting *in rem*. It was urged that such a non-delivery of cargo as was complained of in this case does not confer a maritime lien according to the international rules of law with regard to maritime lien; but the court at Hamburg held that, by virtue of a statute governing the matter in their country, they had power to proceed *in rem* against the ship; and they accordingly did so, and their decision was upheld by two courts of appeal in Germany. That being so, the rule is, that as a matter of international comity, no court in this country can say that the German court had no jurisdiction to decide as they did. It was suggested that the German statute did not authorize the court to do what they did; but it was clearly for that court to construe the statute of their own country and decide accordingly; and we are therefore bound to hold that the ship was rightly condemned in an action *in rem* as if there had been a maritime lien. What then is the result of such a proceeding? When the decision is given it relates back to the time when the cause of condemnation came into existence. It was suggested for the defendants that in this case it was in existence when the ship left Bombay. I do not myself accept that view. I think that it arose when, the ship having arrived at the port of destination, she

ought to have made delivery of the goods. But, when the ship is condemned by a court having jurisdiction to condemn her *in rem*, by that condemnation the property in the ship is taken out of the former owners, and she becomes the ship of the claimants in the proceedings *in rem* to the extent of their claim. They of course have not the possession of the ship, and cannot sell the ship or transfer her when sold. She is in the hands of the court, which orders her sale and gives title to the purchaser, and, when the sale has taken place, the purchase-money is paid into court. The court, treating the money so paid in as representing the ship, orders it, or so much of it as may be necessary to satisfy their claim, to be paid out to the claimants. So in the present case the money which was the proceeds of the sale of the ship was paid into court for the court to deal with, and the court ordered it to be paid to the defendants. It was said on behalf of the plaintiffs that, before the cause of condemnation of the ship arose — that is to say, before the arrival of the ship at Hamburg — an order was made for the winding-up of the plaintiff company; and that the ship was therefore an asset of the company, and the liquidator was entitled to her as a trustee for the benefit of the creditors of the company; and that the defendants, who were only one set of creditors among others, were trustees of the money which they as such creditors had obtained by the judgment of the German court for the whole body of creditors. If the judgment of the German court had not been a judgment *in rem*, this might perhaps have been so, but I think that, the ship having been seized and condemned in a proceeding *in rem* at the suit of the defendants, even although the cause of condemnation did not arise till after the liquidation commenced, nevertheless by reason of her condemnation the ship ceased to be an asset of the company. The present defendants did not in my opinion obtain the money which was paid to them out of the proceeds of the ship by order of the German court as creditors of the company. They obtained it for themselves in their own personal right as persons to whom it was given by the decree of the German court acting *in rem* in a proceeding against the ship. By the judgment of that court the ship was declared to have been to the extent of their claim their property. They received the money which was paid to them by order of the German court, not as creditors of the company, but as being persons declared by the decree of the court to have a lien on the ship, and to be therefore interested in the proceeds of her sale to the extent of that lien. I am of opinion that under these circumstances the defendants cannot either in law or in equity be considered to hold this money as trustees for the liquidator of the plaintiff company. For these reasons I think the appeal must be dismissed.¹

¹ LOPES and CHITTY, L.JJ., delivered concurring opinions. — ED.

CHAPTER XVI.

OBLIGATIONS.

SECTION I.

PENAL OBLIGATIONS.

GRAHAM v. MONSERGH.

SUPREME COURT, VERMONT. 1850.

[*Reported 22 Vermont, 543.*]

REDFIELD, J. This is a complaint and proceeding under the statute in regard to bastards and bastardy. The important facts, admitted on the record, are, that the child, which is confessedly not legitimate, was begotten and born out of the State, and the parties never resided in the State, the mother only being temporarily here at the time the proceedings were instituted. The child resided, or was in the keeping of a family which resided, in Derby in this State, at the time of the trial.

The court are well agreed, that a proceeding for the purpose of affiliating a bastard child and compelling aid from the father in its support is, in its nature, confined to causes of action accruing within the State. The remedy is a peculiar one, and given and regulated exclusively by statute, and has no fair or reasonable application to causes of action accruing out of the State. And if we allow a case which accrued in a neighboring State or province to be brought into our courts, we could not exclude such a case coming from Japan or farther India or Kamschatka. Or, if we admit such cases to come into our courts from countries where similar laws exist, we must, equally, from countries where no such laws exist, and, for aught we can perceive, from those countries where polygamy is allowed to the fullest extent. We should thus be liable to become engaged in a species of knight errantry, in a ludicrous attempt to redress the wrongs and regulate the police of other countries, in matters which very little concern us. The truth is, the proceeding is altogether a matter of internal police, and in its very nature as exclusively local as is the administration of criminal justice.

It is not necessary here to consider how far the case of a woman, *bona fide* coming into this State to reside before the birth of the child, might merit a different consideration. It is supposable, too, that, should the birth of such a child occur during the temporary absence of the mother from the State, with the continuance of the *animus reverendi*, she might, on her return to the State, be entitled to proceed against the father, under these statutes.

Judgment reversed and suit dismissed.

DE BRIMONT v. PENNIMAN.

CIRCUIT COURT OF THE UNITED STATES, SO. DIST. NEW YORK. 1873.

[Reported 10 *Blatchford*, 436.]

WOODRUFF, J. This is an action of debt. The declaration contains two counts. The first is founded on an alleged judgment or decree pronounced in the then Empire of France; the other count is debt on simple contract, for interest alleged to be due to the plaintiff, for the forbearance of moneys due and owing by the defendants to the plaintiff. The first count only is demurred to. That count alleges, that the plaintiff is an alien and a citizen of the French Republic, and that the defendants are citizens of the United States and of the State of New York; that, on the 16th of March, 1868, at Paris, in the then Empire of France, the plaintiff intermarried with the daughter of the defendants; that a child of the marriage was born, who is still living; and that, on the 7th of February, 1869, such daughter, (the wife of the plaintiff,) died. The declaration then sets out certain articles of the Code Civil of France, which provide that children must make an allowance to their father and mother, and other ancestors, who are in need; that sons-in-law and daughters-in-law must, also, in like circumstances, make an allowance to their fathers-in-law and mothers-in-law, but this obligation ceases, first, when the mother-in-law contracts a new marriage, and second, when that one of the married couple through whom the relation of affinity exists is dead and the children born of such couple are also dead; that the obligations springing from the foregoing provisions are reciprocal; and that an allowance is only to be granted in proportion to the necessities of him who claims, and to the means of him who is bound to pay. It is next averred, that, at and prior to the said intermarriage, and at the time of the rendition of the judgment and decree next mentioned, and subsequently to such decree, the defendants were residents of the Empire of France, had the benefit of its laws, and owed to it a temporary allegiance; that, on the 14th of August, 1869, the Civil Tribunal, (particularly mentioned,) at Paris, rendered and pronounced judgment, in an action there pending, wherein the said plaintiff was plaintiff and the said defendants were defendants,

brought by the plaintiff, to obtain an allowance from the defendants, under the said articles of the Code Civil ; that the defendants, jointly and severally, pay to him 18,000 francs per year, in equal monthly payments in advance, such payments to be made from the time that such allowance was first demanded, and should be 6,000 francs for the use of said plaintiff, and 12,000 francs for the use of the said child of the plaintiff and of said daughter of the defendants ; that the defendants were both duly served with process in said action and appeared therein ; that the said Civil Tribunal was a court of the Empire of France, and had jurisdiction of the subject-matter of the action and of the parties ; that the defendants appealed from the said judgment to the Court Imperial of Paris ; that such appeal was there prosecuted by the plaintiff and the defendants, and, on the 5th of May, 1870, such appellate court adjudged and decreed, that the before-mentioned judgment be affirmed in respect of the right of the plaintiff to an allowance, and in respect of the amount, to wit, 18,000 francs per year, and of the appropriation thereof by the plaintiff, to wit, 6,000 francs to the use of the plaintiff and 12,000 thereof to the use of the said child, and in respect of the times and manner in which it should be paid to the plaintiff, to wit, in equal monthly payments, in advance, and did adjudge and decree, that the defendants, jointly and severally, pay to the plaintiff the said sum, and pay the same from the day of the decease of their said daughter, February 7, 1869, as appears, etc., by the records and proceedings of said court, now remaining of record ; that the said judgment and decree of the Court Imperial is final and conclusive, and is in full force, not reversed or annulled or satisfied, etc. ; that such court is a court of general jurisdiction, and had jurisdiction of the subject-matter and of the parties ; and that the plaintiff has not yet obtained satisfaction of the said judgment, whereby an action hath accrued to him to have and demand of the defendants, jointly and severally, the sum of \$10,200, being the value, in currency of the United States, of the sum of 48,000 francs, in which said last-mentioned sum the defendants are, jointly and severally, indebted to the plaintiff, by reason of the said judgment, for the time beginning the 7th of February, 1869, and ending the 7th of November, 1871.

The defendant James F. Penniman demurs to this count, upon various grounds, which I do not think it necessary to enumerate. They were urged on the argument, and, by not noticing many of them further, I am not to be deemed to affirm the sufficiency of the declaration in respect thereto. It is sufficient that the principal question is decided. That question is, whether an action of debt will lie in this court, upon such a decree of a court in France, made against citizens of the United States, husband and wife, temporarily resident in that Empire?

It may not be irrelevant to state, that, besides the articles of the French Code inserted in the declaration, the counsel for the plaintiff admitted, on the argument, and he has stated on his brief, that it is

provided, by other articles of that Code, that the duty to make the allowance which the decree in question provides, ceases whenever the claimant obtains a fortune sufficient for his own support, or the party by whom the payment is to be made becomes unable to pay, or cannot pay without withdrawing means which are required for his own necessities.

The question is novel. No case has been cited by counsel in which a foreign judgment of such a nature has been the subject of an action in this country or in England; and no such case has fallen under my observation. Cases are numerous in which foreign judgments for the recovery of a definite sum of money have been sued upon; and the question has been largely discussed, whether such judgments are conclusive, or are merely *prima facie*, evidence of the debt which they award, and whether, and to what extent, the subject-matter is open to inquiry and proofs, on the original merits. Those cases are not controverted by the counsel for the defendant, but they are deemed not to apply to such a decree as is set out in this declaration. Cases are also numerous in which the force and effect of judgments and decrees in the courts of one of the States of the United States are under consideration in the courts of other of the States, or in the federal courts. Those cases are not deemed to apply to the present, because the Constitution of the United States operates, as between the States, to give them an efficiency not due to a foreign judgment or decree.

In determining the precise question, whether, upon the facts stated in the declaration, the plaintiff shows a cause of action, it may not be material to decide whether such a judgment is, in this court, to be regarded as conclusive, or only *prima facie*, evidence of the indebtedness claimed by the plaintiff; for, if it be either, then, in connection with the allegations showing the law and the relationship of the parties, a demurrer founded in denial of legal liability could not, probably, be sustained. The cases, therefore, which discuss that distinction need not be considered.

The broad question, whether a citizen of the United States, whose daughter marries in France, can be prosecuted here upon a decree of a French court, requiring him and his wife to pay an annuity for the support of their son-in-law, is prior to the inquiry last above referred to. The subject pertains to the domestic relations of our own citizens, and the duties and obligations resulting therefrom; and the decree in question proceeds upon the declaration of an obligation not in conformity with our laws, not known to the common law, and upon the continuance of the obligation itself after the relationship out of which it is deemed to have arisen has ceased by the death of the person through whom the affinity was traced. The nearest analogy to a decree of the nature in question, to which my attention is called, is a decree for alimony, where a divorce, total or partial, has been granted; but the only cases in which such a decree has been held to support an action in another jurisdiction are under the influence of the Constitution of the

United States, and, by force of that Constitution, it was held that a suit would lie, in a Court of Chancery, to compel the performance of the decree. *Barber v. Barber*, 21 How. 582.

It is not irrelevant to a consideration of the nature of the decree in question, to say, that it does not proceed upon the rule of obligation recognized by all civilized nations, that the parent shall support his children during minority, which involves, also, the correlative right to the services of those children while thus supported. Such an obligation has no relation to the case under consideration. Whatever obligation or duty lies at the foundation of the claim of this plaintiff is the creature of positive statute, framed for the people of France, to regulate their domestic concerns, protect the public, and guard against pauperism and its evils. Statutes in some respects similar are found in England, and in most, if not all of the States of this country. The duty of parents and grandparents, and, reciprocally, of children and grandchildren when of sufficient ability, to provide for the necessary support of those relatives, and prevent their becoming a charge to the public, is declared and is enforced. Such regulations are local in their nature and in their application, and so are the orders for their enforcement. They are a part of a local system, to provide for paupers, and to relieve the public from their maintenance, when they have relatives within certain designated degrees, who are of ability to support them. Such orders are subject to modification and adjustment, as circumstances may require, in the States and tribunals wherein they are made. Apart from questions growing out of the Federal Constitution, they can only be enforced in the States where they are made. Orders of filiation are of a similar character. They are mainly for the protection of the public, founded on local statutes, and are in the nature of domestic police regulations. The provisions of the Code of France, set out in the declaration, and the decree of the courts founded thereon, are of the like nature. It would seem, that the policy of that country, as viewed by its courts, does not require that the son-in-law or other claimant shall himself do anything for his own support, but that he is to be supported in idleness. That is probably not a matter of importance to the present inquiry, except so far as it may tend to show that the judgment or decree is hostile to the policy of this country, and in conflict with the only ground upon which orders arbitrarily imposing upon one the burden of supporting another would be tolerated. The principle upon which foreign judgments receive any recognition in our courts is one of comity. It does not require, but rather forbids it, when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens. The courts of this country will be slow to hold that, whenever an American citizen shall visit France, and reside there temporarily with his family, his son or his daughter, by a rash or imprudent marriage, can cast upon the parents, mother as well as father, the perpetual burden of an annuity for the support of the wife or

husband. So long as such residence continues, no doubt, the parents must submit to the laws of France. The orders of her courts may be enforced against them, as those laws may prescribe; but, in a matter of this kind, those laws must be executed there, and such decrees can have, and ought to have, no extraterritorial significance. They rest upon no principles of universal acceptance, like the obligation of contracts, or the protection of generally recognized, private, personal rights. No disposition to deal with foreign judgments, so as to promote the ends of justice, demands that such decrees should be arbitrarily enforced in our courts.

Beyond these considerations, I think it plain, upon the face of the declaration, and, especially where the other admitted provisions of the French Code (stated by the counsel) are brought into view, that the decree itself should be deemed, and would, in France itself, be deemed, local and provisional, and designed to be carried into effect there, and only upon persons and property found there. Their laws contemplate the supervisory control and direction of their courts over the parties, in all the changes which may occur in their relative pecuniary conditions. The decree in question prescribes a temporary rule of allowance and provision for support, subject to modification according to circumstances. There is no award of any sum certain, to be presently paid, and the declaration does not show that any sum whatever could even there be collected, without a further application to the court, for some process or other award of means by which some definite amount shall be collected. Continuing necessity, on the one hand, and continuing ability, on the other, are assumed for the future, and the absence of either makes even the decreed allowance to cease. Without assuming to say that the father-in-law and mother-in-law, if still in France, would not have the *onus* of showing that circumstances had changed, and of procuring a modification of the decree thereupon, these observations bear pertinently on the nature of the decree itself, and with great force on the question how such decree is to be treated in our own courts.

In harmony with what has been already suggested, I add, that we cannot hold that such decree is final, operative, and binding unless and until the defendants go to France and there appeal to the discretion of their courts to modify the decree according to the new circumstances which may arise; and yet, the claim here made, in regard to the effect of the decree in our courts, would require us to give judgment in accordance therewith, even though the defendants offered to prove, and could prove, that the plaintiff had come to a princely inheritance.

Without, therefore, considering the other alleged imperfections in the declaration, or the peculiarity of a decree which charges the wife of the demurrant personally, or the want of any averment that she has any separate estate which can be charged by this court, I am of opinion, that the defendant James F. Penniman is entitled to judgment upon his demurrer.¹

¹ But see *Indiana v. Helmer*, 21 Ia. 370. — ED.

BLAINE v. CURTIS.

SUPREME COURT OF VERMONT. 1887.

[Reported 59 Vermont, 120.]

WALKER, J. The case comes before us upon general demurrer to the declaration; and the only question to be decided is whether the forfeiture imposed by the laws of New Hampshire upon a person receiving interest at a higher rate than six per cent may be enforced by an action of debt, in favor of the person aggrieved, in this State.

The provisions of the statute, which are substantially set out in the declaration, are as follows:—

“If any person, upon any contract, receives interest at a higher rate than six per cent, he shall forfeit three times the sum so received in excess of said six per cent to the person aggrieved, who will sue therefor.”

It is alleged in substance, in the declaration, that the defendant, at Piermont, in the State of New Hampshire, received upon a promissory note for the sum of fifteen hundred dollars then held by the defendant and owing by the plaintiff to her, thirty dollars interest in excess of six per cent from the plaintiff on the 1st day of May in each year for six years, beginning with May, 1876, and ending with May, 1882, making one hundred and eighty dollars thus received by the defendant of the plaintiff in excess of six per cent interest during the years named; it is also alleged that by virtue of the statute of New Hampshire aforesaid, an action hath accrued to the plaintiff to recover of the defendant three times the excess of six per cent interest so paid.

The case stated comes within the statute declared upon; and if the suit had been instituted in New Hampshire, there could be no doubt of the right of the plaintiff to recover, if the action is not barred in that State by the statute of limitations.

The question here is, can the liability imposed by the statute be enforced out of the limits of New Hampshire? This must depend on the nature of the liability and the manner in which it is created. It is not a responsibility *ex contractu*. And the question arises, is it a liability imposed by the statute upon a person receiving illegal interest for a violation of its provisions and penal in its nature, or is it a statute declaratory of the common law right and a means or way enacted for enforcing it, and therefore remedial in its nature?

If it only gave a remedy for an injury against the person by whom it is committed to the person injured, and limited the recovery to the mere amount of loss sustained, or to cumulative damages as compensation for the injury sustained, it would fall within the class of remedial statutes. 1 Bl. Com. 86; 1 B. & P., N. R. 179–180; 2 T. R. 154 and 155 note; 3 Saund. 376 note, 7; 1 Salk. 206; Boice v. Gibbons, 8 N. J. L. 324; Burnett v. Ward, 42 Vt. 80. But this statute does

not limit the recovery to the mere amount of the loss sustained, or to cumulative damages as compensation; it goes beyond and inflicts a punishment upon the offender. It makes the taking of illegal interest an offence, and prescribes a penalty of three times the amount of illegal interest taken. The right of action under it does not arise out of any privity existing between the person paying and the person receiving the illegal interest, but is derived entirely from the statute. The action given is not to recover back money that the person receiving had no lawful right to take and hold against the person paying it, but one to recover a penalty for a breach of a statute law, and founded entirely upon the statute imposing the forfeiture. It was held in *Hubbel v. Gale*, 3 Vt. 266, that whatever may be the form of the action, if it is founded entirely upon a statute, and the object of it is to recover a penalty or forfeiture, it is a penal action. We think the liability created by the statute declared upon is clearly a statutory one imposed upon the person receiving illegal interest as a wrong-doer, and penal in its nature. This view is supported by the decisions of many courts of last resort, some of which have been cited in the argument. We refer, however, only to a decision of the Supreme Court of the United States in a case analogous to the case at bar. The provisions of the act in question are similar to the provisions of the National Currency Act of Congress, approved June 3, 1864, which provides that if unlawful interest is received by any banking association created by it, the person or persons paying the same, or their legal representatives, may recover back in an action of debt twice the amount of interest thus paid from the association taking or receiving the same. This provision of the Currency Act referred to came up for consideration by the Supreme Court of the United States in the case of *Barnet v. Nat. Bank*, 98 U. S. 555, where the plaintiff in error sought to avail himself of the benefit of the act in his defence by way of offset and counterclaim to the bill of exchange on which the suit was brought. Justice Swayne, in delivering the opinion of the court, denied the relief sought, and said: "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved, or his legal representative, must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress. The suit must be brought especially to recover the penalty where the sole question is the guilt or innocence of the accused."

This statute has been repeatedly under consideration by the Supreme Court of the State of New Hampshire, and has been by that court invariably treated as a penal statute. *Harper v. Bowman*, 3 N. H. 489, was an action to recover a forfeiture of three times the illegal interest paid. It was objected that some part of the penalty was barred by the statute of limitations; and the court, in considering the question, held, that the act limiting suits on penal statutes, which provides that actions upon any penal statute shall be brought within

one year from the time of committing the offence, was controlling in the decision of the question raised.

In *Kempton v. Savings Institution*, 53 N. H. 581, the court treated the statute as a penal one in an able opinion upon its construction and rules of pleading applicable to actions brought upon it.

This construction which has been given to the statute by the Supreme Court of the State in which it was enacted treating and holding it a penal statute, should be followed, and is controlling in courts of this State. *Hunt v. Hunt*, 72 N. Y. 217; *Leonard v. Steam Navigation Co.*, 84 N. Y. 48.

It is well settled that no State will enforce penalties imposed by the laws of another State. Such laws are universally considered as having no extraterritorial operation or effect, whether the penalty be to the public or to persons. They are strictly local and effect nothing more than they can reach within the limits of the State in which they were enacted. They cannot be enforced in the courts of another State either by force of the statute or upon the principles of State comity. Story on Conf. Laws, §§ 620-621; Rorer on Int. State Law, 148 and 165; *Ogden v. Folliot*, 3 T. R. 733; *Scoville v. Canfield*, 14 Johns. 338; *First Nat. Bank of Plymouth v. Price*, 33 Md. 487; *Derrickson v. Smith*, 27 N. J. L. 166; *Barnes v. Whitaker*, 22 Ill. 606; *Sherman v. Gassett*, 9 Ill. 521; *Henry v. Sargeant*, 13 N. H. 321; *Slack v. Gibbs*, 14 Vt. 357.

Actions for the recovery of a penalty or forfeiture given by laws of one State upon usurious contracts made and entered into in such State will not lie in another State. Such laws are held to be penal in their nature, and governed by the general rule that they have no extraterritorial force, and can be enforced only by the courts of the State in which they are enacted. Rorer on Int. State Law 165; *Barnes v. Whitaker*, 22 Ill. 606; *Sherman v. Gassett*, 9 Ill. 521.

The judgment of the county court sustaining the demurrer and adjudging the declaration insufficient was correct, and is affirmed.

TAYLOR v. WESTERN UNION TELEGRAPH CO.

SUPREME COURT, IOWA. 1895.

[Reported 95 Iowa, 740.]

THIS is an action to recover damages by reason of the delay of the defendant in transmitting a telegram from Webster, in the State of South Dakota, to Aberdeen, in the same State.

ROTHROCK, J.¹ It appears that there is a statute in force in the State of South Dakota which provides that "every person whose

¹ Only so much of the case as involves the question of penalty is given. — ED.

message is refused or postponed . . . is entitled to recover from the carrier his actual damages and \$50 in addition thereto." The court instructed the jury that, if it was found that the plaintiffs were entitled to recover, the measure of damage would be the value of the animal and the further sum of fifty dollars. The value of the animal was found to be one hundred and fifty dollars, and the general verdict was for two hundred dollars. It is claimed that the court erred in directing the jury to include the fifty dollars in the verdict. We think this position is well taken. That sum is in the nature of a statutory penalty. The message was sent from one point to another in that State, and the law is well settled that penal laws are strictly local, and cannot have any operation beyond the jurisdiction of the State where enacted. *Beach*, Priv. Corp. § 150; *State v. Helmer*, 21 Ia. 370; *Arnold v. Potter*, 22 Ia. 194; *Graham v. Monsergh*, 22 Vt. 534. In 18 Am. & Eng. Enc. Law, 272, the rule is stated as follows: "An extra-territorial effect will not be given to penal statutes, whether the penalty provided for is given to the public or to individuals; nor have the principles of interstate comity any application." Counsel for the plaintiffs do not seriously question that this is the law, and the offer is made to remit the fifty dollars in this court.¹

HUNTINGTON v. ATTRILL.

SUPREME COURT OF THE UNITED STATES. 1892.

[*Reported 146 United States, 657.*]

GRAY, J.² This was a bill in equity filed March 21, 1888, in the Circuit Court of Baltimore City, by Collis P. Huntington, a resident of New York, against the Equitable Gas Light Company of Baltimore, a corporation of Maryland, and against Henry Y. Attrill, his wife and three daughters, all residents of Canada, to set aside a transfer of stock in that company, made by him for their benefit and in fraud of his creditors, and to charge that stock with the payment of a judgment recovered by the plaintiff against him in the State of New York, upon his liability as a director in a New York corporation, under the statute of New York of 1875, c. 611. . . . On June 30, 1880, Attrill, as a director of the company, signed and made oath to, and caused to be recorded, as required by the law of New York, a certificate which he knew to be false, stating that the whole of the capital stock of the corporation had been paid in, whereas in truth no part had been paid in; and by making such false certificate became liable, by the law of New York, for all the debts of the company contracted before January 29, 1881, including its debt to the plaintiff. . . .

¹ See *Carnahan v. W. U. T. Co.*, 89 Ind. 526. — ED.

² Part of the opinion is omitted. — ED.

The bill prayed that the transfer of shares in the gas company be declared fraudulent and void, and executed for the purpose of defrauding the plaintiff out of his claim as existing creditor; that the certificates of those shares in the name of Attrill as trustee be ordered to be brought into court and cancelled; and that the shares "be decreed to be subject to the claim of this plaintiff on the judgment aforesaid," and to be sold by a trustee appointed by the court, and new certificates issued by the gas company to the purchasers; and for further relief.

One of the daughters demurred to the bill, because it showed that the plaintiff's claim was for the recovery of a penalty against Attrill arising under a statute of the State of New York, and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the State of Maryland. . . .

The Circuit Court of Baltimore City overruled the demurrer. On appeal to the Court of Appeals of the State of Maryland, the order was reversed, and the bill dismissed. 70 Md. 191.

The ground most prominently brought forward and most fully discussed in the opinion of the majority of the court, delivered by Judge Bryan, was that the liability imposed by section 21 of the statute of New York upon officers of a corporation, making a false certificate of its condition, was for all its debts, without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained, and was intended as a punishment for doing any of the forbidden acts, and was, therefore, in view of the decisions in that State and in Maryland, a penalty which could not be enforced in the State of Maryland; and that the judgment obtained in New York for this penalty, while it "merged the original cause of action so that a suit cannot be again maintained upon it," and "is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings," yet did not change the nature of the transaction, but, within the decision of this court in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, was in its "essential nature and real foundation" the same as the original cause of action, and therefore a suit could not be maintained upon such a judgment beyond the limits of the State in which it was rendered. pp. 193-198. . . .

A writ of error was sued out by the plaintiff and allowed by the Chief Justice of the Court of Appeals in Maryland. . . .

Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. . . .

The test whether a law is penal, in the strict and primary sense, is

whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Bl. Com. 2. . . .

Upon the question what are to be considered penal laws of one country, within the international rule which forbids such laws to be enforced in any other country, so much reliance was placed by each party in argument upon the opinion of this court in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, that it will be convenient to quote from that opinion the principal propositions there affirmed:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." p. 290.

"The application of the rule of the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered." p. 291.

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." pp. 292, 293.

"The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State." p. 299. . . .

The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in *Dennick v. Railroad Co.*, 103 U. S. 11. . . .

That decision is important as establishing two points: 1st. The court considered "criminal laws," that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extraterritorially. 2d. A statute of a State, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, might be enforced in a Circuit Court of the United States held in another State, without regard to the question whether a similar liability would have attached for a similar cause in that State. . . .

The provision of the statute of New York, now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or *quasi* criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers; and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security, for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country. . . .

It is true that the courts of some States, including Maryland, have declined to enforce a similar liability imposed by the statute of another State. But, in each of those cases, it appears to have been assumed to be a sufficient ground for that conclusion, that the liability was not founded in contract, but was in the nature of a penalty imposed by statute; and no reasons were given for considering the statute a penal law in the strict, primary, and international sense. *Derrickson v. Smith*, 3 Dutch. (27 N. J. Law), 166; *Halsey v. McLean*, 12 Allen, 438; *First National Bank v. Price*, 33 Md. 487.

It is also true that in *Steam Engine Co. v. Hubbard*, 101 U. S. 188, 192, Mr. Justice Clifford referred to those cases by way of argument. But in that case as well as in *Chase v. Curtis*, 113 U. S. 452, the only point adjudged was that such statutes were so far penal that they must be construed strictly; and in both cases jurisdiction was assumed by the Circuit Court of the United States, and not doubted by this court, which could hardly have been if the statute had been deemed penal within the maxim of international law. In *Flash v. Conn*, 109 U. S. 371, the liability sought to be enforced under the statute of New York was the liability of a stockholder arising upon contract; and no question was presented as to the nature of the liability of officers.

But in *Hornor v. Henning*, 93 U. S. 228, this court declined to consider a similar liability of officers of a corporation in the District of Columbia as a penalty. See also *Neal v. Moultrie*, 12 Ga. 104; *Cady v. Sanford*, 53 Vt. 632, 639, 640; *Nickerson v. Wheeler*, 118 Mass. 295, 298; *Post v. Toledo, &c. Railroad*, 144 Mass. 341, 345; *Woolverton v. Taylor*, 132 Ill. 197; *Morawetz on Corporations* (2d ed.), § 908.

The case of *Missouri Pacific Railway v. Humes*, 115 U. S. 512, on which the defendant much relied, related only to the authority of the legislature of a State to compel railroad corporations, neglecting to provide fences and cattle-guards on the lines of their roads, to pay double damages to the owners of cattle injured by reason of the neglect; and no question of the jurisdiction of the courts of another State to maintain an action for such damages was involved in the case, suggested by counsel, or in the mind of the court.

The true limits of the international rule are well stated in the decision of the Judicial Committee of the Privy Council of England, upon an appeal from Canada, in an action brought by the present plaintiff against Attrill in the Province of Ontario upon the judgment to enforce which the present suit was brought. The Canadian judges, having in evidence before them some of the cases in the Court of Appeals of New York, above referred to, as well as the testimony of a well-known lawyer of New York that such statutes were, and had been held by that court to be, strictly penal and punitive, differed in opinion upon the question whether the statute of New York was a penal law which could not be enforced in another country, as well as upon the question whether the view taken by the courts of New York should be conclusive

upon foreign courts, and finally gave judgment for the defendant. *Huntington v. Attrill*, 17 Ont. 245, and 18 Ont. App. 136.

In the Privy Council, Lord Watson, speaking for Lord Chancellor Halsbury and other judges, as well as for himself, delivered an opinion in favor of reversing the judgment below, and entering a decree for the appellant, upon the ground that the action "was not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the State of New York for punishment of an offence against their municipal law." The fact that that opinion has not been found in any series of reports readily accessible in this country, but only in 8 Times Law Reports, 341, affords special reasons for quoting some passages.

"The rule" of international law, said Lord Watson, "had its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of some one representing the public; were local in this sense, that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex loci*, ought to be admitted in the courts of any other country. In its ordinary acceptation, the word 'penal' might embrace penalties for infractions of general law, which did not constitute offences against the State; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs, which was the very essence of the international rule."

After observing that, in the opinion of the Judicial Committee, the first passage above quoted from *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 290, "disclosed the proper test for ascertaining whether an action was penal within the meaning of the rule," he added: "A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the State whose law had been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies were presumably enacted in the interest and for the benefit of the community at large; and persons who violated those provisions were, in a certain sense, offenders against the State law as well as against individuals who might be injured by their misconduct. But foreign tribunals did not regard those violations of statute law as offences against the State, unless their vindication rested with the State itself or with the community which it represented. Penalties might be attached to them, but that circumstance would not bring them within the rule, except in cases where those penalties were recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter was regarded as an *actio*

popularis pursued, not in his individual interest but in the interest of the whole community."

He had already, in an earlier part of the opinion, observed: "Their lordships could not assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the State of New York. They had to construe and apply an international rule, which was a matter of law entirely within the cognizance of the foreign court whose jurisdiction was invoked. Judicial decisions in the State where the cause of action arose were not precedents which must be followed, although the reasoning upon which they were founded must always receive careful consideration and might be conclusive. The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced, and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case, and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal."

In this view that the question is not one of local, but of international law, we fully concur. The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.

In this country, the question of international law must be determined in the first instance by the court, State or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. *Burgess v. Seligman*, 107 U. S. 20, 33; *Texas & Pacific Railway v. Cox*, 145 U. S. 593, 605, above cited. If a suit on the original liability under the statute of one State is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. *New York Ins. Co. v. Hendren*, 92 U. S. 286; *Roth v. Ehman*, 107 U. S. 319. But if the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed

by recovering judgment upon it. This was directly adjudged in *Wisconsin v. Pelican Ins. Co.*, above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other.

If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense. . . .

The judgment rendered by a court of the State of New York, now in question, is not impugned for any want of jurisdiction in that court. The statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law in the international sense. The faith and credit, force and effect, which that judgment had by law and usage in New York, was to be conclusive evidence of a direct civil liability from the individual defendant to the individual plaintiff for a certain sum of money, and a debt of record, on which an action would lie, as on any other civil judgment *inter partes*. The Court of Appeals of Maryland, therefore, in deciding this case against the plaintiff, upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith, credit, and effect to which it was entitled under the Constitution and laws of the United States.

*Judgment reversed, and case remanded to the Court of Appeals of the State of Maryland for further proceedings not inconsistent with the opinion of this court.*¹

FULLER, C. J., dissented: LAMAR and SHIRAS, JJ., did not sit.

FARR v. BRIGGS.

SUPREME COURT OF VERMONT. 1900.

[Reported 72 Vermont, 225.]

TYLER, J. Appeal from the disallowance of a claim by the commissioners upon the estate. The following are the material facts alleged in the declaration and admitted by the demurrer:—

The Vermont Investment Company was a corporation created and organized in May, 1882, under the laws of South Dakota, and having offices and places of business in that State and in Burlington, Vt., for the negotiating of loans and the sale of promissory notes and other securities.

¹ *Acc. Huntington v. Attrill*, [1893] A. C. 150. *Contra*, *First Nat. Bank v. Price*, 33 Md. 487; *Halsey v. McLean*, 12 All. 438; *Derrickson v. Smith*, 3 Dutch. 166; *Woods v. Wicks*, 7 Lea, 40. — ED.

The statute under which the corporation was created contains the following provision:—

“The directors of corporations must not make dividends except from the surplus profit arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase their capital stock, except as especially provided by law. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen), are, in their individual and private capacity jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section.”

The capital stock issued and subscribed for was five hundred and twenty-three shares of the par value of one hundred dollars per share; yet the directors contracted debts and liabilities against the corporation largely in excess of the stock subscribed.

George C. Briggs, of Burlington, was a stockholder in the corporation, was duly constituted a director thereof and qualified and acted as such while it continued to do business. He attended its meetings, participated in its transactions, expressed no dissent to the creation of debts as aforesaid and caused none to be entered upon its records.

The corporation sold to the plaintiff in this State and guaranteed the payment of various notes to a large amount, and thereby became liable to pay the same to him at maturity if the makers failed to pay them.

The plaintiff demanded payment of the notes and obligations so purchased by him as they respectively fell due, of the makers, and upon failure of payment by them, made demand of payment of the corporation pursuant to its guaranty. The corporation became insolvent and was dissolved in December, 1893, and all its assets were exhausted, whereupon the plaintiff presented his claim against Briggs' estate upon the ground that, as one of the directors of the corporation, by virtue of the statute, Briggs became liable to pay him the amount of his debts against the corporation and that the claim survived against his estate.

The statute of South Dakota evidently was the general law of that State under which all business corporations were required to be organized. Upon the election of the directors they became subject to all its requirements and liable to the corporation and to its creditors, within that State at least, for a violation thereof. The question is

whether the statute had any extraterritorial force — whether creditors outside the limits of that State have any remedy by virtue of its provisions.

It is well settled that penal statutes will receive no recognition and are not enforceable in other States than the ones in which they were enacted. Story on Conf. Laws, §§ 620, 621; *Halsey v. McLean*, 12 Allen, 439, 90 Am. Dec. 157 and notes; *Blaine v. Curtis*, 59 Vt. 120; *Adams v. R. R. Co.*, 67 Vt. 76. The plaintiff concedes this to be the rule of law, but contends that the statute under which the present action is brought is not penal, but contractual. The defendant estate claims that the statute is strictly penal.

Statutes similar to that under which the present action is brought, making the directors of business corporations personally liable for their default in the performance of certain prescribed duties, have received much consideration by law writers and courts. In Cook on Cor., § 223, in Morawetz, § 907, and in Thompson, §§ 3052 and 4164, it is said that such statutes have generally been held to be penal. Courts of high authority have so held. In *Bank v. Price*, 33 Md. 488, a Pennsylvania statute which provided that, if any debts or liabilities should be contracted exceeding the amount of the capital stock of the corporation actually paid in, the directors and officers contracting the same should be jointly and severally liable in their individual capacity for the whole amount of the excess, and that the same might be recovered in an action of debt, was considered as imposing a penalty, and that it could only be enforced in the State which enacted it. In *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146, the same doctrine was held under the statute of another State which provided that officers of certain corporations should be personally liable for the debts of the corporation in case they neglected to file an annual report showing the financial condition of the corporation. See also *Stokes v. Stickney*, 96 N. Y. 323; *Carr v. Rischer*, 119 N. Y. 117. The same was held in *Derrickson v. Smith*, 27 N. J. L. 166; in *Diversey v. Smith*, 103 Ill. 375, 40 Am. Rep. 4; and in *Chase v. Curtis*, 113 U. S. 452.

[The learned judge here stated at length the case of *Huntington v. Attrill*, 146 U. S. 657.]

In *Neal v. Moultrie*, 12 Ga. 104, the charter of a bank provided that the total amount of the debts which the corporation should at any time owe should not exceed three times the amount of stock paid in, and made the directors liable for such excess; held, that as a right of action and recovery was given to individuals, or a particular class of individuals, the act was remedial and not penal. The court remarked that the act not only looked to the interests of the public at large, but, "it was also a measure of individual security which created rights in individual citizens."

In *Witters, Receiver, v. Foster*, Admr., 26 Fed. R. 737, cited by defendant, which was a bill of revivor, the original bill charged the intes-

tate, with other directors of a bank, with neglect of duty in not requiring a bond of the cashier, in allowing persons to become indebted to an amount exceeding one-tenth of the capital, and in reckoning assets as good as a basis of dividends, when they were worthless, etc., in violation of United States statutes. These statutes gave no remedy to the creditors or stockholders, and the court held that the ground of the orator's claim was the personal and official guilt of the intestate, for the omission of duties which, had they been performed, might have benefited the assets of the bank, and that the cause of action did not survive. The same court, Wheeler, J., in an action to enforce the personal liability of directors of a corporation under a Vermont statute, which provided that the corporation should not contract debts exceeding three-fourths the amount of its capital paid in, and made the stockholders and directors personally holden to the creditors, if the indebtedness should exceed that amount, held that the directors' liability for the debt arose out of the assent to the contract creating the debt and was that of contracting debtors, and clearly drew the distinction between such a statute and one that declared liability for some act or neglect in no way connected with the contracting of debts, as for neglect to file reports, which the court said was penal. *Field v. Haines*, 28 Fed. R. 919. See also *R. R. Co. v. Graves*, 80 Fed. R. 588, where this distinction is maintained; *Cook on Cor.*, § 1; *Thomp. on Cor.*, §§ 4168, 8525-6; *Mor. on Cor.*, § 908.

The defendant cites *Wind. Prov. Inst. v. Sprague et al.*, 43 Vt. 502, which arose under the same statute as *Field v. Haines* and to enforce a similar liability. The court used the expression that, "the creation of this additional liability seems to have been intended as a check upon the directors and stockholders in the contraction of debts, and to have been imposed, in some sort, as a penalty . . ." It also said, "to visit this penalty upon any others than those who caused the infraction of the charter would be manifestly unjust," etc. The word penalty may have been used inadvertently; it clearly was used in no other sense than that a party should make pecuniary payment for the breach of his contract.

Cady et al. v. Sanford et al., 53 Vt. 632, was a case against the defendants as directors of a corporation organized under the laws of this State, which made them personally liable for debts contracted before publishing the articles of association. The liability of the directors was treated as contractual, though the case was decided for the defendants upon the ground that their liability was only collateral to that of the company, and that no debt against the company had been established.

Blaine v. Curtis, 59 Vt. 120, was an action to recover a penalty imposed by the statute of New Hampshire for taking unlawful interest. The statute was held to be penal, but the court said: "If it only gave a remedy for an injury against the person by whom it was committed to the person injured, and limited the recovery to the mere amount of loss sustained, or to cumulative damages as compensation for the injury

sustained, it would fall within the class of remedial statutes." This is the rule laid down in *Boies v. Booth*, 2 W. Bl., "that where the damages are given wholly to the party injured, as compensation for the wrong and injury, the statute, having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so called, but remedial."

It appears by the cases above referred to that it was the doctrine of this court long before *Huntington v. Attrill* was decided, that where the purpose of a statute is to furnish a remedy to creditors who have been injured by the directors' violation of the requirements of the statute, the liability of such officers is contractual, and actions upon such statutes are transitory and can be brought in any State in courts of competent jurisdiction.

Some of the decisions by courts of other States in which a different doctrine has been held have been rendered upon statutes not containing the remedy for creditors, which is expressly provided in the South Dakota statute. That statute clearly is not penal either in its letter or intent, but it grants a right of action to private persons who have suffered pecuniary injury in consequence of certain officers of corporations violating the statute, to recover damages of those officers, the extent of whose liability is the amount of pecuniary loss sustained by such private persons — creditors of the corporation. No public wrong was committed when the directors exceeded the prescribed limit in creating debts. The creditors were the only persons upon whom a wrong was committed, and they have a remedy by virtue of the *quasi* contract which the directors entered into with them when the sales of securities were made, to the effect that the directors were not exceeding the prescribed limits in creating debts. The obligation which the statute imposed upon the directors not to create debts beyond a certain limit entered into the contracts of sales of securities which the directors made through their agents. The directors created the debt in this jurisdiction, and the statute of the sister State fixes the extent of their liability, which does not arise from their personal misconduct merely irrespective of its effect upon the property rights of others, but, as was said by the court in *Field v. Haines*, *supra*, "the liability arises out of the assent to the contract creating the debt." As was said in *Wind. Prov. Inst. v. Sprague*, *supra*, in respect to directors: "They can keep the indebtedness of the company within the limits fixed by the legislature, or they can extend that indebtedness beyond that limit and voluntarily take upon themselves the relation of joint debtors to the creditors of the company." The liability is similar to that of sureties and guarantors, and evidently was imposed partly for the purpose of inducing the directors to perform their prescribed duties, and partly as a means of securing the creditors of corporations from losses occasioned by the acts of their officers.

Pro forma judgment reversed ; demurrer overruled ; declaration held sufficient ; cause remanded.

ERICKSON v. NESMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1862.

[Reported 4 Allen, 233.]

DEWEY, J. The plaintiffs set forth in their bill in equity that they are the holders of sundry promissory notes to the amount of \$19,300, of a certain corporate body known and incorporated by the name of the "Franklin Mills," duly organized under a charter obtained in New Hampshire, by which the said corporation were authorized to carry on the business of manufacturing cotton and woollen goods in the towns of Franklin and Northfield in said State; and they aver that the said notes are due and unpaid, although a demand has been made upon the corporation therefor. The bill further alleges that the defendants are personally liable for the payment of said notes, having been stockholders in said corporation when the debts were contracted, and when they became due and payable. Such personal liability is alleged to arise from certain provisions in the laws of New Hampshire, providing that the stockholders shall be jointly and severally liable for all debts and contracts of such corporation until the whole amount of the capital stock fixed by the company shall have been paid in, and a certificate thereof shall have been duly recorded in the office of the clerk of the town where such corporation has its place of business, or is situated. A further provision is also found in the same statute, making the stockholders of such corporation liable for debts of the corporation in case the company shall fail to give notice annually in the month of May, to the governor, of the amount of debts due to and from said corporation, and the value of the property and assets of said corporation. An amendment was subsequently allowed, alleging that the bill was brought in behalf of all the creditors.

The defendants filed a general demurrer.

Independently of the statute provisions, no responsibility for the payment of these notes would attach to the defendants. The legal body who alone would be held the debtor would be the corporation.

The inquiry is, whether these statute provisions of the State of New Hampshire can furnish a legal ground for the courts of Massachusetts to charge the defendants in a bill in equity with the payment of the indebtedness of the corporation upon these notes. An attempt has heretofore been made to do so in an action at law by the plaintiffs against John Nesmith, one of these defendants. The court refused to sustain such action, and by so doing necessarily held that the liability of the stockholders was not that of an ordinary contractor, on an original indebtedness, which could of course be enforced here, as well as in New Hampshire, against a resident here. Indeed, it was expressly said that "the liability on which the present action is founded is

created solely by the statute of the State of New Hampshire." *Erickson v. Nesmith*, 15 Gray, 221.

It is true, the principal ground assigned for refusing to entertain the action was that no such action was allowed to be maintained in New Hampshire against a stockholder, by those laws, a bill in equity being there required, in which, under the decision of their courts, all the stockholders must be made defendants, and, as it would seem, the suit must be brought in behalf of all the creditors. This was a sufficient reason for dismissing that action; but the court were careful not to express any opinion upon the question whether even a bill in equity could be maintained against a citizen of Massachusetts, in the courts of Massachusetts, for the purpose of charging him with the statute liability created solely by virtue of the laws of New Hampshire. The court in that case say, as to that matter, if such bill in equity will not lie, "it will be because the statute of the State which confers on them the right, has failed to provide a remedy which can be used beyond the limits of its own territory."

We have long had statutes substantially similar to those under which the defendants are sought to be charged. The construction put upon them by this court has been that the individual liability of stockholders in manufacturing corporations was one of a particular and limited character, or to be enforced only in the mode, and by the use of the particular remedy, named in the statute. Thus it was held, under *St. 1808, c. 65*, that the liability did not constitute a charge upon the estate of a deceased stockholder. *Child v. Coffin*, 17 Mass. 64; *Ripley v. Sampson*, 10 Pick. 370. In *Andrews v. Callender*, 13 Pick. 490, it was said by the court that "the liabilities of the individual members of the corporation are created by the statute; and it is clear that at common law the corporation only would be liable."

These cases were before the enactment of *Rev. Sts. c. 38*, but apply equally to the latter statute. In *Gray v. Coffin*, 9 Cush. 199, it is said that this individual liability is one depending upon the provisions of positive law, and is to be construed strictly. In *Dane v. Dane Manufacturing Co.*, 14 Gray, 488, it was held that this liability is not one that survives, and requires the executor to appear in the case, and take upon himself the defence. In *Bangs v. Lincoln*, 10 Gray, 600, it was held that the liability of a stockholder could not be the subject of an allowance as against the estate of a person in insolvency under the insolvent laws of Massachusetts, there having been no judgment against the corporation, or the necessary previous steps to fix the same as an absolute debt against the party as an individual stockholder.

In *Knowlton v. Ackley*, 8 Cush. 96, where an action of law was brought against a stockholder of a manufacturing corporation for a debt contracted by the corporation, seeking to charge such liability under the statute provision as to failure to pay in the whole capital, and recording a certificate to that effect, the court refused to sustain such action, holding that the liability, if it existed at all, was the statute

liability as a stockholder; and that the defendant was not liable on the original contract, as the debtor for the articles furnished to the corporation.

The further inquiry is, whether a liability of this character, fixed upon the stockholders of a manufacturing corporation wholly by the statutes of New Hampshire, the mode of enforcing it, or the remedy, being found wholly in such foreign statute, can be properly enforced in this State against one or more of our citizens who may have become stockholders in such foreign corporation. When the statute confers a right and prescribes a remedy, that particular remedy and that only can be pursued. The only remedy given by the statute of New Hampshire is by a bill in equity. Such a bill, as it seems by the decision of the court of that State in *Hadley v. Russell*, 40 N. H. 109, means a bill in behalf of all the creditors, and against all the stockholders. This was so assumed in the opinion of this court in the former case between these parties. In *Knowlton v. Ackley*, this court, in denying an action at law, and suggesting the remedy by bill in equity, seem to assume that the bill will be against all the stockholders, and for the benefit of all the creditors.

If this be so, we perceive at once strong reasons why such a bill should be brought in the State which created the corporation, and where the same is located by the express terms of its charter, and where its place of business is. The effect of maintaining such a bill is to draw before the court all the creditors of the corporation, all the stockholders, and necessarily, as we should suppose, the principal debtor, the corporation itself. The fact of the residence of a single stockholder in Massachusetts, who might be liable in a New Hampshire corporation in common with a hundred stockholders residing there, would upon that hypothesis transfer to our jurisdiction all such stockholders and all the creditors, and authorize us to hear and adjust all conflicting questions as to the indebtedness of the corporation, who were stockholders, and what were the equities between them.

Great practical difficulties meet us at once. There are strong reasons for holding that, in case of an existing corporation, the debt sought to be recovered of a stockholder should be first established by a judgment of court. If this be doubtful, it is at least necessary that before such debt be established by the proceedings in the bill in equity, the corporation should have been made a party to the bill. *Bogardus v. Rosendale Manuf. Co.*, 3 Seld. 151. But we have no jurisdiction that will reach such corporation out of this commonwealth, and having no assets here, and the same is true of the stockholders residing in New Hampshire. A bill in equity in Massachusetts is therefor not the remedy intended to be prescribed by the statute of New Hampshire creating and regulating the liability of stockholders in a manufacturing corporation in New Hampshire.

It is urged on the part of the plaintiffs that great practical evil may result from thus refusing to charge a party here who is an actual stock-

holder of a corporation in New Hampshire, but who resides without its limits. To this it may be replied, that it would be a much more serious evil to hold that the whole matter of winding up the concerns of a bankrupt corporation of New Hampshire, ascertaining who are its creditors, who its stockholders, what is the amount of its assets, and how are the same to be distributed, should be transferred to the jurisdiction of Massachusetts by reason of the residence here of a single member of such corporation. There seems to be no practicable mode of dealing with such corporation and its members, when seeking to charge the latter upon their statute liability, but to proceed in the manner prescribed by the statute creating such liability, and in the local jurisdiction where the corporation was established and carries on its business, and by whose local statutes alone the liability exists.

Demurrer sustained.

B. R. Curtis & H. C. Hutchinson, (D. S. Richardson with them,) for the defendants. The liability of the stockholders depends upon the statutes of New Hampshire, and can be enforced in this State only by comity. The remedy provided in those statutes is local. *Pickering v. Fisk*, 6 Verm. 102; *Drinkwater v. Portland Marine Railway*, 18 Me. 35. The liability is peculiar, and has not the ordinary characteristics of a debt. The claim does not survive. *Dane v. Dane Manuf. Co.*, 14 Gray, 488. It is not provable in insolvency. *Kelton v. Phillips*, 3 Met. 61; *Gray v. Coffin*, 9 Cush. 192; *Bangs v. Lincoln*, 10 Gray, 600. It cannot be enforced at common law by action. *Gray v. Coffin*, 9 Cush. 192; *Knowlton v. Ackley*, 8 Cush. 93. The remedy provided is specific, and limited to the State of New Hampshire. A prior judgment against the corporation is essential to the maintenance of a bill in equity. And the corporation is a necessary party to such a bill. *Hadley v. Russell*, 40 N. H. 109; *Tibballs v. Bidwell*, 1 Gray, 399.

J. C. Dodge, for the plaintiffs. By the statutes of New Hampshire, the stockholders are jointly and severally liable for these debts. In New Hampshire this liability is treated as a contract. *Chesley v. Pierce*, 32 N. H. 388, 405; *Haynes v. Brown*, 36 N. H. 545; *Hicks v. Burns*, 38 N. H. 141. If this is so, the remedy is not necessarily confined to New Hampshire, but may be enforced wherever the stockholders reside. *Story Conf. Laws*, §§ 38, 329, 619-628; 2 *Kent Com.* (6th ed.), 457, 458; *Bank of Augusta v. Earle*, 13 Pet. 519. The result of these authorities is that the laws of one State or nation, except those of a penal character, may and will be enforced in other States or nations, *ex comitate*, unless contrary to their known policy, or injurious to their interests, or prejudicial to the rights of their citizens. No distinction in this respect can be traced between the statute and common law. The enforcement of this obligation is not contrary to the policy of Massachusetts. *Gen. Sts. c. 60, §§ 17, 18*. It is not prejudicial to a man's rights to compel him to perform his obligations. To hold that this liability cannot be enforced out of New Hampshire will

make it of little value as security to creditors. Such liability has repeatedly been enforced out of the States whose laws created the corporations. *Ex parte* Van Riper, 20 Wend. 614; Sackett's Harbor Bank v. Blake, 3 Rich. Eq. (S. C.) 226; Perkins v. Church, 31 Barb. 84; Bond v. Appleton, 8 Mass. 472. Clearly the corporation might be sued here.¹

BANK OF NORTH AMERICA v. RINDGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 154 Massachusetts, 203.]

ALLEN, J. The plaintiff is a corporation of the State of New York. The defendant is a resident of California, who owned fifty shares of stock in the Haddam State Bank, a corporation of Kansas. The plaintiff recovered judgment in Kansas for \$5,343 and costs against the Haddam State Bank, and took out execution thereon, but could find no property of the bank whereon to levy, and so the execution was returned unsatisfied. No steps were taken in Kansas to charge the defendant as a stockholder in the bank, but, he being found in Massachusetts, the plaintiff brings this action against him here, seeking to charge him personally for the judgment against the bank to the amount of the par value of his shares therein, namely, \$5,000. This is sought to be done by virtue of the laws of Kansas, respecting which the averment in the declaration is as follows:—

“And the plaintiff further says, that by the laws of the State of Kansas, if any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, and such plaintiff may maintain an action at law against any one or more of the stockholders of such corporation to recover a debt due by the corporation.”

The declaration was demurred to, and we have to determine whether the plaintiff states a case upon his declaration.

The declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statu-

¹ *Acc.* Russell v. Pac. Ry., 113 Cal. 258, 45 Pac. 323; Young v. Farwell, 139 Ill. 326, 28 N. E. 845; Tuttle v. Nat. Bank, 161 Ill. 497, 44 N. E. 984; Lowry v. Inman, 46 N. Y. 119; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419; Nimick v. Mingo Iron Works Co., 25 W. Va. 184; Finney v. Guy, 111 Wis. 296, 87 N. W. 255; May v. Black, 77 Wis. 101, 45 N. W. 949. — Ed.

tory, or rest merely in judicial decisions. It is to be regretted that we are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that State. But we must take the case as the parties present it to us.

The question can hardly be considered as an open one in this Commonwealth. This court has often declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other States under statutes of those States. In *Post & Co. v. Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341, 345, it is said: "This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created." See also *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 353, and cases cited.

The case at bar furnishes a strong illustration of the propriety of this course. If the plaintiff, as a creditor of the Kansas corporation, without obtaining any previous judgment in Kansas establishing the defendant's liability as a stockholder, can maintain an action directly and in the first instance against him in Massachusetts, for the purpose of charging him as a stockholder under the qualified liability set forth in the declaration, then it would follow that the plaintiff might also institute a similar action against him in California, or in any number of other States where service upon him could be obtained. The plaintiff might also institute similar actions for the same debt in different States against other stockholders. In such case, it is probable that a judgment against one stockholder without satisfaction would be no bar to actions against others, but it is obvious that the defendants in such actions might be put to great inconvenience in ascertaining, and indeed might find it practically impossible to ascertain, what steps the plaintiff might have taken against other stockholders in other States. A dishonest creditor might possibly recover several times over against different stockholders in different States, before they respectively could ascertain the facts. Likewise, the defendant, if compelled to pay under a judgment recovered in one State, would find it difficult, if not impossible, to enforce contribution from other stockholders residing elsewhere. Moreover, if the plaintiff might maintain such actions against the defendant and against other stockholders in different States, until he should finally recover satisfaction, other creditors of the Kansas corporation might also do the same. If every creditor of a Kansas corporation, which has no property with which to respond to a judgment obtained by such creditor against it in Kansas, may thereupon, without any further proceedings in that State to charge the stockholders, maintain an action against every stockholder in every

State in the Union where service can be obtained, and pursue such action until satisfaction is obtained from some stockholder in some State, it is obvious that a large amount of litigation might ensue, under which substantial justice as among the stockholders could not be worked out. The liability of the stockholder, as set forth in the declaration, is not a general liability for all the debts of the corporation. The execution against the stockholder which can be issued in Kansas in the action against the corporation, as set forth in the declaration, is only "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." Probably, by the true construction of the laws of Kansas, the action at law to charge stockholders, which is given as an alternative remedy, would be limited to the same amount as the execution; though, according to the averment of the declaration, the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, without any other limitation being expressed. The present plaintiff does not contend that it can recover against the defendant the full amount of its judgment, but only the par value of the defendant's stock in the bank. The liability sought to be enforced is a strictly limited one. It seems to us that a *bona fide* or at any rate a compulsory payment to one creditor would discharge a stockholder to that extent from liability to others; and a payment of the full par value of his stock would, according to the view which has been expressed by this court, be a full discharge: *Halsey v. McLean*, 12 Allen, 438, 442; though as to this other courts might hold otherwise. *Fowler v. Robinson*, 31 Me. 189; *Grose v. Hilt*, 36 Me. 22. There is no averment in the declaration that the defendant has not been thus discharged from liability, and perhaps this is not necessary, as it would be more properly a matter of defence; but in case of several actions in different States, questions of priority of the claims of creditors might arise, upon which the decisions of the courts of the different States might not be uniform, and thus the defendant might be held liable more than once. The cases cited by the defendant appear to show that in some States the creditor first bringing suit has priority. *Ingalls v. Cole*, 47 Me. 530; *Thebus v. Smiley*, 110 Ill. 316. In Missouri, the creditors rank in the order in which they respectively obtained judgment. *State Savings Association v. Kellogg*, 63 Mo. 540. In other States, no priority among the creditors is recognized. *Pfohl v. Simpson*, 74 N. Y. 137; *Wright v. McCormack*, 17 Ohio St. 86; *Eames v. Doris*, 102 Ill. 350; *Chicago v. Hall*, 103 Ill. 342. See *Thompson, Liability of Stockholders*, §§ 420-426; 2 *Morawetz, Corp.* (2d. ed.), § 897. Even a compulsory payment might not avail to protect him. Moreover, the defendant might by way of set-off present claims which he holds either against the corporation in Kansas, or against the creditor who sues him, and different decisions in respect to his right of set-off might be made in different States.

These considerations are suggested to illustrate the practical diffi-

culty of enforcing a liability such as that set forth in the declaration in other States than that where the corporation is established, in such a way as to secure substantial justice. This difficulty is far greater in cases where no steps have been taken in the State where the corporation is established to ascertain and determine the amount of each stockholder's liability. There the whole amount of debts can be ascertained, and the proper proportion assessed upon each stockholder; or his liability can be otherwise determined in a manner which will avoid many of the objections which exist against the maintenance of actions like the present. We remain satisfied with the conclusions heretofore reached by this court, that such an action under the circumstances which appear here ought not to be entertained in this State. Limiting our decision to the facts now before us, it is this: That a resident of the State of New York cannot maintain in the courts of this State an action against a resident of the State of California, to establish his personal liability as a stockholder of a corporation organized in the State of Kansas, and having no place of business in this State, for a debt of that corporation to the plaintiff, under laws of Kansas such as are set forth in the declaration, providing for a certain special and limited liability on the part of stockholders, when no judicial proceedings have been taken in Kansas to ascertain and establish the liability of the defendant as such stockholder.

Whether the same result might not be reached on the ground that the subsidiary liability of stockholders such as is set forth is matter of remedy only, and does not follow the stockholder outside of the State, there being no averment of a different construction of the statute by the Kansas courts, we need not consider. *Brown v. Eastern Slate Co.*, 134 Mass. 590.

*Judgment for the defendant affirmed.*¹

HANCOCK NATIONAL BANK v. ELLIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1898.

[Reported 172 *Massachusetts*, 39.]

THE plaintiff was a creditor of the Commonwealth Loan and Trust Company, a private corporation established under the laws of the State of Kansas, and had recovered judgment against the Loan and Trust Company in the Circuit Court of the United States for the District of

¹ *Acc. State Nat. Bank v. Sayward*, 86 Fed. 45; *Coffing v. Dodge*, 167 Mass. 231, 45 N. E. 928; *Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538. And see *Tuttle v. Nat. Bank*, 161 Ill. 497, 44 N. E. 984; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419. — ED.

Kansas. Execution issued for the amount of the judgment and was returned unsatisfied. The defendant, a resident of the Commonwealth, is owner of several shares of stock in the Loan and Trust Company. The statutes of Kansas provide that a stockholder shall be liable for the debts of the corporation to an amount equal to the par value of the stock owned by him. This action was brought to enforce payment by the defendant of the debt due from the Loan and Trust Company to the plaintiff.¹

FIELD, C. J. This court has many times decided that the statutes of other States, creating the liability of stockholders to creditors of a corporation, which provide for a suit of a special kind to which the corporation and all the stockholders are to be made parties, will not in general be enforced by the courts of this State. It often happens that the courts of this State could acquire no jurisdiction over the corporation which is a necessary party, or over many of the stockholders, and the suit itself is sometimes of a kind unknown to our laws. The proper courts of the State under whose laws the corporation is established have full jurisdiction over the corporation. Whether in such a suit such courts can acquire jurisdiction over all the stockholders, wherever they reside, in order to determine their liability under the statutes to which they may be held to have assented in becoming stockholders, it is unnecessary now to consider. The proceedings are somewhat analogous to the laying of assessments ratably upon all stockholders for the purpose of paying the debts of the corporation in the manner and to the extent prescribed by the statutes. The special remedy provided by the statutes must be pursued, and, as the statutes of a State have no force *ex proprio vigore* beyond the territorial limits of the State, the remedy usually must be pursued in the State where the corporation has been established and the statutes passed. *Erickson v. Nesmith*, 15 Gray, 221; s. c. 4 Allen, 233; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; *Post v. Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341; *Bank of North America v. Rindge*, 154 Mass. 203; *Coffing v. Dodge*, 167 Mass. 231. See *Fourth National Bank v. Francklyn*, 120 U. S. 747; *Lowry v. Inman*, 46 N. Y. 119; *May v. Black*, 77 Wis. 101, 107; *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114; *Nimick v. Mingo Iron Works*, 25 W. Va. 184. . . .

In *Post v. Toledo, Cincinnati, & St. Louis Railroad*, *ubi supra*, this court say: "The obligation imposed by the Statutes of Ohio upon the stockholders for the purpose of securing the payment of the debts of the corporation is *quasi ex contractu*. It must be taken that all persons who become stockholders in an Ohio corporation know the law under which the corporation is organized, and assent to the liability which that law imposes upon stockholders, and that all persons who deal with the corporation rely upon the liability of the stockholders as security for the payment of whatever debts may be due them from the corporation.

¹ This statement of facts is substituted for that contained in the opinion. Part of the opinion is omitted. — ED.

It is for the people or the legislature of each State to determine to what extent, if at all, the stockholders of corporations created by the laws of that State shall be liable for the debts of such corporations. It was early the policy of Massachusetts to make every stockholder liable to have his property taken to satisfy a judgment against a Massachusetts corporation of which he was a member; see *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516; and although this policy has now been changed, and the liability restricted to specific cases, and to corporations of a particular character, yet there is nothing in the laws of Ohio, as stated in the bill, that is so opposed to the general policy of our laws that even citizens of Massachusetts, who voluntarily have become stockholders in Ohio corporations, should not be held to perform the obligations imposed by those laws."

When the liability is distinctly imposed by statute upon the stockholders severally, it would be unfortunate if it could not be enforced against stockholders not resident within the State under whose laws the corporation has been established, on the ground that due process could not be served on them within that State, and the courts of the State where they reside would not take jurisdiction of suits to enforce the liability.

It certainly concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligations toward creditors of the corporation which they have assumed by becoming stockholders.

The remedy provided by paragraphs 1200 and 1204 of the General Statutes of Kansas, even if applicable to the present case, was not intended to be exclusive when a judgment has been obtained against the corporation. The present plaintiff has pursued exactly the remedy provided by paragraph 1192 of those statutes. That paragraph permits the plaintiff to proceed by action to charge the stockholders with the amount of the judgment. The courts of Kansas hold that the action must be against the stockholders severally, and not jointly. The stockholder who pays more than his proportion of any debt of the corporation may compel contribution from the other stockholders by action. The creditor of the corporation can by action collect the amount of his judgment remaining unpaid of any stockholder, "to any extent equal to the amount of stock by him or her owned, together with any amount unpaid thereon." The stockholder is discharged as against all creditors of the corporation when he has paid the debts of the corporation to this extent. We are unable to see in what manner the enforcement of these statutes by the courts of Massachusetts against stockholders resident here, at the instance of a creditor of the corporation, does any injustice to the citizens of Massachusetts. If they pay what they are required to pay, they have the same remedy for contribution which any other stockholders have. This remedy may be difficult to enforce, because the stockholders may reside in many different States or countries; but the same remedy for contribution is given to all stockholders wher-

ever they reside. The legislature of Kansas has chosen to give to the creditors of certain of its corporations the security which the individual liability of each stockholder affords, to the extent prescribed by its statutes, leaving the burden of enforcing contribution from other stockholders on any stockholder who has been compelled to pay anything in discharge of the debts of the corporation. This somewhat resembles the law of Massachusetts whereby judgment creditors of cities and towns can levy execution on the property of any inhabitant, and such inhabitant is left to enforce contribution from the other inhabitants. Persons becoming stockholders in foreign corporations can ascertain the nature and extent of the liability of the stockholders in such corporations according to the laws of the State or country under which the corporations are organized, and they cannot complain if this liability is enforced against them. . . .

Upon the evidence introduced at the trial, a majority of the court think that the reasonable inference is that the action given to enforce the liability of stockholders under paragraph 1192 of the General Statutes of Kansas of 1889 was intended to be a transitory action of such a nature that it might be brought in any court of general jurisdiction over similar actions in any State or country where service according to the laws of that State or country could be made upon a stockholder. . . .

*Exceptions sustained.*¹

¹ *Acc.* *Flash v. Conn.*, 109 U. S. 371; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640 (reversing 20 R. I. 466, 40 Atl. 340); *Rhodes v. U. S. Nat. Bank*, 66 Fed. 512; *McVicar v. Jones*, 70 Fed. 754; *Whitman v. Nat. Bank*, 83 Fed. 288; *Mechanics' Sav. Bank v. Fidelity Ins. Co.*, 87 Fed. 113; *Dexter v. Edmands*, 89 Fed. 467; *Kisseberth v. Prescott*, 91 Fed. 611; *Hale v. Haddon*, 95 Fed. 747; *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023; *Bell v. Farwell*, 176 Ill. 189, 52 N. E. 346; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *First Nat. Bank v. Gustin*, 42 Minn. 327, 44 N. W. 198; *Rule v. Omega S. & G. Co.*, 64 Minn. 126, 67 N. W. 60; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Aldrich v. Anchor Coal & Development Co.*, 24 Or. 32, 32 Pac. 756; *Aultman's Appeal*, 98 Pa. 505; *Cushing v. Perot*, 175 Pa. 66, 34 Atl. 447.

A corporation or its receiver may, in a foreign State, sue a stockholder for calls on the stock. *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177, 40 N. E. 462; *Stoddard v. Lum*, 159 N. Y. 265, 53 N. E. 1108; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489. But see *New Haven H. N. Co. v. Linden Spring Co.*, 142 Mass. 349, 7 N. E. 773. So one stockholder may sue another in a foreign State for contribution. *Allen v. Fairbanks*, 45 Fed. 445. — ED.

SECTION II.

OBLIGATIONS EX DELICTO.

RICHARDSON v. NEW YORK CENTRAL RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1867.

[Reported 98 Massachusetts, 85.]

HOAR, J. The court are all of opinion that this action cannot be maintained, and that the demurrer must prevail.

There is great difficulty in ascertaining what cause of action this plaintiff has against the defendants, or how she acquired any. By the common law, and by the laws of this Commonwealth, no action could be brought against the railroad company for negligently causing the death of the plaintiff's intestate. This is conceded; and the plaintiff rests her case wholly on the statute of New York. If this be a penal statute, it cannot be enforced beyond the territory in and for which it was enacted. If it gives a new and peculiar system of remedy, by which rights of action are transferred from one person to another in a mode which the common law does not recognize, and which is not in conformity with the laws or practice of this Commonwealth, there is an equally insuperable objection to pursuing such a remedy in our courts.

The plaintiff's counsel, in their ingenious and impressive argument, being apparently fully aware of the difficulties of the case, have placed their claim to recover upon the ground that the statute of New York vested a right of property in the widow and her children at the moment of the husband's death, and designated a trustee to receive and enforce this right, whose capacity to sue will be sustained in any forum.

The right of property which the statute defines is of a very peculiar nature. In the first place, the act or default which caused the death must be such as would, if death had not ensued, have entitled the party injured to an action to recover damages in respect thereof. This the statute makes requisite to give the personal representative an action for damages, and it would thus seem that the action was designed to be for the purpose of compensating the injury to the deceased. But we next find that the compensation is not to go to the personal representative of the deceased, to be disposed of as other property or rights of property belonging to the deceased. It is not to be applied in payment of his debts, nor is it subject to the provisions of his will. It is not the injury to the deceased which is to be estimated at all. The whole amount is not to exceed five thousand dollars; and, with that limitation, the jury may give such damages as they shall deem a fair and just

compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. The damages, therefore, are to be for the pecuniary injuries to the wife and next of kin. But, when the pecuniary interests of the wife and next of kin in the death have been ascertained, the sum recovered on this basis is not to be paid over to these several parties in proportion to their respective pecuniary interests thus determined or regarded, but is to be distributed to them in the proportion provided by laws for the distribution of intestate personal property. If we take some one of the next of kin, therefore, it may follow that, because the defendants caused by negligence the death of the plaintiff's intestate, this person may recover by virtue of the statute, through the plaintiff as administratrix, a sum of money which has no relation to the extent of the injury done to the deceased; and no relation to the extent of the injury done to the person who is to receive it. If the jury should deem three thousand dollars a fair and just compensation for the pecuniary injury resulting to the wife, and one thousand dollars to one of the next of kin, and five hundred dollars to another, and should be of opinion that there was no pecuniary injury to the others of the next of kin, from the death, they would assess as damages four thousand five hundred dollars; and this the plaintiff would be bound to distribute according to the statute of distributions, which makes no reference to the pecuniary interest of the distributee in the death. In the language of Mr. Justice Denio, "these statutes have introduced a principle wholly unknown to the common law, namely, that the value of a man's life to his wife or next of kin constitutes, with a certain limitation as to amount, a part of his estate, which he leaves behind him to be administered by his personal representatives;" and "though the action can be maintained only in the cases in which it could have been brought by the deceased if he had survived, the damages nevertheless are given upon different principles, and for different causes." *Whitford v. Panama Railroad Co.*, 23 N. Y. 468.

If we understand that the limitation of the defendants' responsibility to cases in which the deceased would have had a right of action if he had survived, is not intended to make his right of action survive to his representatives, but is only meant to define and describe the cases in which the right of property and of action is recognized in the widow or next of kin, we have still the question to meet, How can that be regarded as anything else than a statute penalty, which the personal representative of the deceased is to recover by an action; which is limited in amount, although that amount may be much less than the extent of the injury sustained by those whose loss is to be estimated in computing it; and which is to be distributed among the parties entitled to receive it, not in proportion to the injuries which they have respectively sustained, but in proportion to the shares to which they would be severally entitled in the distribution of an intestate estate? We do not readily find a satisfactory answer

to this question. But a complete and decisive objection to the maintenance of the action by this plaintiff remains.

The plaintiff is the administratrix appointed under the law of Massachusetts. Her right to sue in this Commonwealth, in her representative capacity, is upon causes of action which accrued to her intestate, or which grow out of his rights of property, or those of his creditors. The remedy which the statute of New York gives to the personal representatives of the deceased, as trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a Massachusetts executor or administrator, *virtute officii*, so as to give him the right to sue in our courts, and to transmit the right of action from one person to another in connection with the representation of the deceased. The only construction which the statute can receive is, that it confers certain new and peculiar powers upon the personal representative in New York. The administrator in Massachusetts is in privity with the New York administrator only to the extent which our laws recognize. A succession in the right of action, not existing by the common law, cannot be prescribed by the laws of one State to the tribunals of another. It is upon this principle that the negotiability of contracts, and whether an assignee can maintain an action in his own name, is held to be determined by the *lex fori*, and not by the *lex loci contractus*; a matter not of right, but of remedy. *McRae v. Mattoon*, 10 Pick. 49; *Warren v. Copelin*, 4 Met. 594; *Foss v. Nutting*, 14 Gray, 484, and cases cited.

For the reason, therefore, that the right of action which the New York statute gives to the personal representative of the deceased in that State is not a right of property passing as assets of the deceased, but is a specific power to sue created by their local law, it does not pass to the plaintiff as administratrix in Massachusetts, and this suit cannot be maintained by her.

*Demurrer sustained.*¹

DENNICK v. RAILROAD COMPANY.

SUPREME COURT OF THE UNITED STATES. 1880.

[Reported 103 *United States*, 11.]

ERROR to the Circuit Court of the United States for the Northern District of New York.

¹ A few cases often cited as in agreement with this case are not in point. *McCarthy v. C. R. I. & P. R. R.*, 18 Kan. 46; *Woodard v. M. S. & N. I. R. R.*, 10 Oh. S. 121; *Needham v. G. T. R. R.*, 38 Vt. 294.

In some jurisdictions the same conclusion is reached on the ground that the statutes of the two States are not identical in terms. *Ash v. B. & O. R. R.*, 72 Md. 144, 19 Atl. 643; *Railway Co. v. McCormick*, 71 Tex. 660, 9 S. W. 540. — Ed.

MILLER, J. It is understood that the decision of the court below rested solely upon the proposition that the liability in a civil action for damages which, under the statute of New Jersey, is imposed upon a party, by whose wrongful act, neglect, or default death ensues, can be enforced by no one but an administrator, or other personal representative of the deceased, appointed by the authority of that State. And the soundness or unsoundness of this proposition is what we are called upon to decide.

It must be taken as established by the record that the accident by which the plaintiff's husband came to his death occurred in New Jersey, under circumstances which brought the defendant within the provisions of the first section of the act making the company liable for damages, notwithstanding the death.

It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury.

It is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right.

Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the Circuit Court of the United States for the Northern District were competent to try such a case when the parties were properly before it. *Mostyn v. Fabrigas*, 1 Cowp. 161; *Rafael v. Verelst*, 2 W. Bl. 983, 1055; *McKenna v. Fisk*, 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish that in all cases where the several States have substituted the statute for the common law, the liability can be en-

forced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. See *Ex parte Van Riper*, 20 Wend. (N. Y.) 614; *Lowry v. Inman*, 46 N. Y. 119; *Pickering v. Fisk*, 6 Vt. 102; *Railroad v. Sprayberry*, 8 Bax. (Tenn.) 341; *Great Western Railway Co. v. Miller*, 19 Mich. 305.

But it is said that, conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction.

The statute does not say this in terms. "Every such action shall be brought by and in the names of the personal representatives of such deceased person." It may be admitted that for the purpose of this case the words "personal representatives" mean the administrator.

The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such a suit shall *not* be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the State or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here, also, by construction, "if they reside in the State of New Jersey"?

It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say that it depends on the appointment of an administrator within the State?

The second section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages, and to whom they shall be paid. In this there is no ambiguity. But fearing that there might be a question as to the proper person to sue, the act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not a case of an administrator, appointed in one State, suing in that character in the courts of another State, without any authority from the latter. It is the general rule that this cannot be done.

The suit here was brought by the administratrix in a court of the State which had appointed her, and of course no such objection could be made.

If, then, the defendant was liable to be sued in the courts of the State of New York on this cause of action, and the suit could only be brought by such personal representative of the deceased, and if the plaintiff is the personal representative, whom the courts of that State are bound to recognize, on what principle can her right to maintain the action be denied?

So far as any reason has been given for such a proposition, it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and cannot be compelled to distribute the amount received in accordance with the New Jersey Statute.

But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute.

Again: it is said that, by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his lifetime. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, such as specific property devised to individuals, or the amount which by the legislation of most of the States is set apart to the family of the deceased, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and impose on him the duty of distributing under that law. There can be no doubt that an administrator, clothed with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay it over to some one who establishes a better right thereto, or that what he so recovers is held in trust for some one not claiming under him or under the will. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs.

It is to be said, however, that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and that an administrator appointed under the law of that State would be held to have recovered to the same uses, and subject to the remedies in his fiduciary character which both statutes prescribe.

We are aware that *Woodward v. Michigan Southern & Northern Indiana Railroad Co.* (10 Ohio St. 121) asserts a different doctrine, and that it has been followed by *Richardson v. New York Central*

Railroad Co., 98 Mass. 85, and *McCarthy v. Chicago, Rock Island, & Pacific Railroad Co.*, 18 Kan. 46. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the Court of Appeals of New York, in the case of *Leonard, Administrator, v. The Columbia Steam Navigation Co.*, not yet reported, but of which we have been furnished with a certified copy.

The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different States. The questions growing out of these statutes are new, and many of them unsettled. Each State court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action.

*Judgment reversed with directions to award a new trial.*¹

O'REILLY *v.* NEW YORK AND NEW ENGLAND RAILROAD.

SUPREME COURT OF RHODE ISLAND. 1889.

[*Reported 16 Rhode Island, 388.*]

DURFEE, C. J.² The second count is designed to subject the defendant corporation to liability under a statute of Massachusetts, Pub. Stat. of Mass., cap. 112, §§ 163, 212, 213. The count is defective in some particulars, but counsel, waiving these defects for the present, have asked us to decide whether the action is maintainable in this State.

The liability is imposed by section 213. That section provides that if a person is injured by collision with the engines or cars of a railroad corporation at a crossing, such as is described in section 163, and it appears that it neglected to give the signals required by section 163, and that such neglect contributed to the injury, the corporation shall be liable, in case the life of the person so injured is lost, to damages recoverable by the executor or administrator of the deceased, in an action of tort, as provided in section 212, unless it is shown that in addition to a mere want of ordinary care, the person injured was at

¹ *Acc. Texas & P. Ry. v. Cox*, 145 U. S. 593; *Stewart v. B. & O. R. R.*, 168 U. S. 445; *Wilson v. Tootle*, 55 Fed. 211; *Western & A. R. R. v. Strong*, 52 Ga. 461; *Burns v. Grand Rapids & I. R. R.*, 113 Ind. 169; *Bruce v. C. R. R.* 83 Ky. 174; *Chicago, S. L. & N. O. R. R. v. Doyle*, 60 Miss. 977; *Missouri Pac. Ry. v. Lewis*, 24 Neb. 848; *Usher v. West Jersey R. R.*, 126 Pa. 206; *Nashville & C. R. R. v. Sprayberry*, 8 Baxt. 341; *Nelson v. Chesapeake & O. Ry.*, 88 Va. 971, 14 S. E. 838. — Ed.

² Only so much of the opinion as discusses the second count is given. — Ed.

the time of the collision guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence or unlawful act contributed to the injury.

Section 212 subjects railroad corporations to liability where, by reason of their carelessness, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger, or in their employment, is lost. The provision for such case is, that the offending corporation may be punished by fine or indictment, or sued for damages in an action of tort, the fine imposed, or the damages recovered, according as one or the other remedy is pursued, to be not less than five hundred nor more than five thousand dollars, the damages, in case the corporation is civilly prosecuted, "*to be assessed with reference to the degree of culpability of the corporation, or of its servants or agents.*" The fine is to be paid "to the executor or administrator for the use of the widow and children of the deceased in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin;" and in case of a civil action, which is to be brought by the executor or administrator, the damages recovered are to go in the same manner. The remedy, whether criminal or civil, is to be prosecuted within a year after the injury.

The requirement of section 163 is, that every locomotive shall be furnished with a bell and steam whistle, and that the bell shall be rung or the whistle sounded, at the distance of at least eighty rods from every grade crossing, and be kept ringing or sounding, continuously or alternately, until the engine has passed. The claim is that the injury to the intestate resulted from an omission to ring the bell or sound the whistle as required.

It will be seen that the statute creates an entirely new cause of action, giving the executor or administrator of the deceased power to prosecute it: not, however, in his representative capacity, since he is empowered to prosecute, not for the benefit of the estate, but for the use of certain designated persons. The question is, whether an executor or administrator, appointed in Rhode Island, shall be taken to have the right to prosecute the action in the courts of Rhode Island. Similar questions, arising under somewhat similar statutes, have been differently decided by different tribunals. The following cases hold that such an action is not maintainable out of the State by which it is authorized. *Richardson, Adm'r, v. New York Central R. R. Co.*, 98 Mass. 85; *Woodward v. The Mich. S. & N. Ind. R. R. Co.*, 10 Ohio St. 121; *Taylor's Adm'r, v. The Pennsylvania Co.*, 78 Ky. 348; *McCarthy, Ad'm, v. Railroad Co.*, 18 Kans. 46; *Vawter v. The Missouri Pacific Railway Co.*, 84 Mo. 679. See also *Anderson v. Milwaukee & St. Paul R. R. Co.*, 37 Wis. 321; *Pickering v. Fisk*, 6 Vt. 102; *Judge of Probate v. Hibbard et als.*, 44 Vt. 597; also, 8 Amer. Rep. 396; *Illinois Central R. R. Co. v. Cragin*, 71 Ill. 177. The following cases allow such an action. *Dennick v. Railroad Co.*, 103

U. S. 11; Leonard *v.* Columbia Steam Navigation Co., 84 N. Y. 48; Stockman *v.* Railroad Co., 15 Mo. App. 503. The ground of decision in the two last named cases is, that the cause of action accrued under a statute which, notwithstanding some minor differences, was substantially the same as a statute of the State in which the action was brought. The decision in Dennick *v.* Railroad Co. rests on that and more general grounds of comity. The liability in question in each of said three cases, however, was remedial, not penal, the rule of liability being no more exacting than it would have been in favor of the deceased if he had survived, and the damages recoverable being recoverable as compensation.

We have in this State a statute subjecting railroad corporations to liability for negligence resulting in death, Pub. Stat. R. I. cap. 204, §§ 15, 16, 17, and 18, but it differs materially from the Massachusetts statutes especially in that it has none of the penal features of that statute. For this reason we do not think it necessary to decide which of the two sets of cases above cited lays down the true doctrine; for it seems to be well settled that each of the States will be left by the others solely to itself to give effect to its penal legislation. Commonwealth *v.* Green, 17 Mass. 515, 540; Hunt & wife *v.* Town of Pownal, 9 Vt. 411, 417; Scoville *v.* Canfield, 14 Johns. Rep. 338; Brigham, Assignee, *v.* Clafin, 31 Wis. 607, 616; First National Bank of Plymouth *v.* Price *et al.*, 33 Md. 488; Halsey *v.* McLean, 12 Allen, 438; Derrickson *v.* Smith, 27 N. J. Law, 166; Bird *v.* Hayden, 2 Abb. Pr. N. S. 61. That the liability imposed by the Massachusetts statutes is penal is very clear. The damages, as we construe the provision, are directed "to be assessed with reference to the *degree of culpability* of the corporation, or of its servants or agents," and to the amount of at least five hundred dollars. These directions clearly show a punitive purpose. So likewise, confirmatorily at least, does the direction that the recovery shall not be prevented by contributory negligence, unless it be gross or wilful. One of the remedies given by section 212 is an indictment, the fine prescribed in case of conviction being not less than \$500 nor more than \$5,000. The same remedy is given by section 213, if the injury be not mortal. It would seem that where death ensues there is provision only for a civil action, but the provision is part and parcel of legislation which has its penal purpose thus clearly stamped upon it.

Our conclusion is that an action founded on said provision is not maintainable in this State, and that the demurrer to the second count must be sustained.

*Demurrers sustained.*¹

¹ Acc. Dale *v.* A. T. & S. F. R. R., 57 Kan. 601, 47 Pac. 521; Adams *v.* Fitchburg R. R. 67 Vt. 76, 30 Atl. 687. — Ed.

GARDNER v. NEW YORK AND NEW ENGLAND
RAILROAD.

SUPREME COURT OF RHODE ISLAND. 1892.

[*Reported 17 Rhode Island, 790.*]

TILLINGHAST, J. This is an action of trespass on the case, to recover damages for injuries alleged to have been sustained by the negligence of the defendant corporation.

The accident occurred at a grade crossing on the defendant's road at Danielsonville, in the State of Connecticut; and the third count of the plaintiff's declaration is based upon sections 3553 and 3554 of the General Statutes of said State of Connecticut, which are set forth in said count.

These sections are as follows:—

"SECT. 3553. Every engine used upon any railroad shall be supplied with a bell of at least thirty-five pounds' weight, and a suitable steam whistle, which bell and whistle shall be so attached to such engine as to be conveniently accessible to the engineer, and in good order for use.

"SECT. 3554. Every person controlling the motions of any engine upon any railroad shall commence sounding the bell or steam whistle attached to such engine when such engine shall be approaching, and within eighty rods of, the place where said railroad crosses any highway at grade, and keep such bell or whistle occasionally sounding until such engine has crossed such highway; and the railroad company in whose employment he may be shall pay all damages which may accrue to any person in consequence of any omission to comply with the provisions of this section; and no railroad company shall knowingly employ any engineer who has been twice convicted of violating the provisions of this section."

The defendant has demurred to said third count in the plaintiff's declaration, on the ground that the said statute, upon which it is based, is penal in its nature, and, being a statute of another State, there can be no recovery under it beyond the territory in and for which it was enacted.

The plaintiff makes no contention that a penal statute has any extraterritorial force, but simply claims that the statute counted on is remedial only, and not penal in its nature.

The only question raised by the demurrer therefore is, whether said section 3554 is penal in its nature.

A penal statute is one by which some punishment is imposed for a violation of the law. A statute may be penal in one part and remedial in another: Sutherland on Statutory Construction, § 208, and cases cited; and in such case, when it is sought to enforce the penalty, it is to be construed as a penal statute; and when it is sought to enforce the civil remedy provided, it is to be construed as remedial in its

nature. While the statute before us imposes a duty upon the defendant corporation with regard to the giving of signals at grade crossings, it does not impose any penalty for the neglect or violation of such duty. The only punishment, if such it may properly be called, for such neglect or violation of duty, is the damages to which it may subject itself at the suit of the party who is injured by reason thereof.

It is true that the last clause of said section 3554 reads like a penal statute, in that it provides that "no railroad company shall knowingly employ any engineer who has been twice convicted of violating the provisions of this section." But, notwithstanding this prohibition upon the railroad company, there is no penalty provided for its violation; nor is there any mode provided, so far as we are informed, whereby an engineer may be convicted for violating the provisions of said statute.

We are therefore of the opinion that said statute is not penal either in whole or in part, but remedial only. It simply provides that a railroad company shall pay all damages which may accrue to any person in consequence of any omission to comply with the provisions thereof. And it is well settled that where a statute only gives a remedy for an injury against the person committing it to the person injured, and the recovery is limited to the amount of loss sustained, or to cumulative damages, as compensation for the injury, it falls within the class of remedial statutes. *Blaine v. Curtis*, 59 Vt. 120; *Brice v. Gibbons*, 8 N. J. Law, 324.

There are cases which even go to the extent of holding that statutes giving double damages for injuries sustained by reason of the neglect of towns to keep their highways in repair, and for injuries by dogs, are remedial and not penal, the cumulative damages being given as compensation. *Stanley v. Wharton*, 9 Price, 301. See *Reed v. Northfield*, 13 Pick. 94; *Mitchell v. Clapp*, 12 Cush. 278; *Palmer v. York Bank*, 18 Me. 166; *Bayard v. Smith*, 17 Wend. 88.

The counsel for the defendant contends that the statute relied on by the plaintiff in the count demurred to is very similar to the one relied on in *O'Reilly v. N. Y. & N. E. R. R. Co.*, 16 R. I. 388, 392, which last named statute this court held to be penal in its nature. We fail to see the similarity between these two statutes. In the Massachusetts statute relied on by the plaintiff in the case last cited, the railroad company is subjected to liability where, by reason of its carelessness, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in its employment, is lost. "The provision for such case," said Durfee, C. J., in delivering the opinion of the court, "is, that the offending corporation may be punished by fine, or indictment, or suit for damages in an action of tort, the fine imposed, or the damages recovered, according as one or the other remedy is pursued, to be not less than five hundred nor more than five thousand dollars; the damages, in case the corporation is civilly

prosecuted, *to be assessed with reference to the degree of culpability of the corporation or of its servants or agents.*"

That statute clearly comes within the definition of a penal statute as above given. A penalty is attached for its violation, and a mode is provided for the recovery of such penalty, while, in the statute before us in this case, there is no penalty attached to the violation thereof.

Demurrer overruled.

WALSH v. NEW YORK AND NEW ENGLAND RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[*Reported 160 Massachusetts, 571.*]

HOLMES, J.¹ This is an action of tort to recover for a personal injury suffered by the plaintiff in Connecticut. . . .

If, however, we assume, as was ruled and as we do assume, that if the accident had happened in this State the plaintiff could not have recovered, it is argued that he cannot recover now. A decision in Wisconsin and language from some English cases are cited which more or less favor this contention. *Anderson v. Milwaukee & St. Paul Railway*, 37 Wis. 321; *The Halley*, L. R. 2 P. C. 193, 204; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28, 29; *The M. Moxham*, 1 P. D. 107, 111. Possibly, when it becomes material to scrutinize the question more closely, the English law will be found to be consistent with our views. But however this may be, we are of opinion that, as between the States of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties. See *Higgins v. Central New England & Western Railroad*, 155 Mass. 176. It is unnecessary to consider whether we should be prepared to adopt in its full extent what is thought by the learned editor of *Story, Conflict of Law* (8th ed.), § 625, note *a*, to be the true doctrine, — that "whether the domestic law provides for redress in like cases should in principle be immaterial, so long as the right is a reasonable one and not opposed to the interests of the State." The cases cited, *Dennick v. Railroad Co.*, 103 U. S. 11, and *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48, go further than the decisions of this State. *Richardson v. New York Central Railroad*, 98 Mass. 85. The policy of the supposed Connecticut rule cannot be said to be opposed to that prevailing here, even apart from statute. See St. 1893, c. 359.

*Exceptions overruled.*²

¹ Part of the opinion is omitted. — ED.

² *Acc. Herrick v. M. & S. L. R. R.* 31 Minn. 11. — ED.

SECTION III.

OBLIGATIONS EX CONTRACTU.

WAYMELL v. REED.

KING'S BENCH. 1794.

[*Reported 5 Term Reports, 599.*]

IN assumpsit for goods sold and delivered, the defence was, that the contract was a smuggling transaction. It appeared in evidence that the defendants had applied to the plaintiff, who was a foreigner living at Lisle, for a quantity of lace, which he knew was intended to be smuggled into England; and for that purpose it was packed by the plaintiff in a peculiar manner, by the direction of the defendants, for the more easy conveyance of it without a discovery. A verdict was taken for the plaintiff, subject to be set aside, and a nonsuit entered, if this court should be of opinion that the plaintiff was not entitled to recover under these circumstances; — a rule having been obtained for that purpose,

Erskine and *Best* showed cause; admitting that, if this had been a transaction between subjects of this country, the plaintiff, according to the doctrine laid down in *Biggs v. Lawrence*, 3 Term. Rep. 454, could not have recovered; neither could he, if he had been concerned in the risk of smuggling them into this country: but they contended that the bare circumstance of knowledge that the goods were to be smuggled, could furnish no ground of objection against the plaintiff, who was a foreigner residing abroad; and who, not owing any allegiance to this country, was not bound by any moral or political ties to take cognizance of its revenue laws. And they relied upon the case of *Holman v. Johnson*, Cowp. 344, as establishing the distinction they insisted upon. As to the circumstance of the plaintiff's having assisted in packing the goods in a particular manner, it was done in consequence of the special orders of the defendants, the buyers, whose directions in that respect it was their business to obey; but that cannot vary the case, unless they assisted in transporting the goods into this country. The question in all the cases has been, Whether the delivery abroad were complete: if it have been, the seller, especially in the case of a foreigner, is not responsible for the use intended to be made of the goods afterwards. And here the sale was complete before the goods left Lisle. The cases of *Biggs v. Lawrence*, *supra*, and *Clugas v. Penaluna*, 4 Term Rep. 466, went on the ground that the contracting parties were subjects of this country; and therefore that it was illegal for the plaintiffs to assist him in packing the goods for the purpose of smuggling them. But the

case of *Holman v. Johnson* was expressly recognized in both those cases.

Bower and Garrow, contra, were stopped by the court.

LORD KENYON, C. J. It is not necessary to enquire now, Whether or not it be immoral for a native of one country to enter into a contract with the subject of another, to assist the latter in defrauding the revenue laws of his country? It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord Mansfield in *Holman v. Johnson, supra*, to which I entirely subscribe, that where the contract and delivery of goods are complete abroad, and the seller does not act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid, that purpose. He cannot, therefore, resort to the laws of this country to assist him in carrying his contract into execution. What was said by Lord Mansfield, at the end of *Holman v. Johnson*, comes up to the present case.

BULLER, J. In *Holman v. Johnson*, the seller did not assist the buyer in the smuggling; he merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendants in the act of smuggling, by packing the goods up in a manner most convenient for that purpose. And if he undertook to deliver the goods in that manner, knowing the use intended to be made of them, he was offending against the laws of this country in the very contract itself.

GROSE, J., declared himself of the same opinion.

Rule absolute.

HILL v. SPEAR.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1870.

[Reported 50 *New Hampshire*, 253.]

FOSTER, J.¹ The main question in this case is, whether Stewart, represented here by the defendant, an attaching officer, holding the property of Emerson by virtue of Stewart's attachment, can, as against the plaintiff, claiming title to the same by purchase from Emerson, hold the property thus attached; the object of Stewart's suit and attachment being to recover the price of spirituous liquors sold by him to Emerson, and by Emerson resold in violation of our laws; — or, in

¹ Part of each of the opinions, in which the authorities bearing on the question are exhaustively examined, is omitted. — Ed.

fewer words, whether, under the circumstances of this case the court will lend its aid towards the enforcement of Stewart's claim to recover the price of the spirituous liquors thus sold by him.

In order to make a correct application of the principles and rules of law which are to determine this question, it will be necessary to examine with care the peculiar facts of the case.

Stewart was a dealer in spirituous liquors, residing and doing business in the city of New York: Emerson was a retailer of spirituous liquors at his saloon in Manchester. This establishment, in the hands of Emerson and his predecessors in the same business, was well known to Stewart, who had frequently visited the saloon, and of whom Emerson and the preceding proprietors of the saloon had previously bought liquors which were retailed by them to their customers.

There was evidence from which the jury might have found that, on at least one occasion when Stewart was at the saloon, he virtually solicited orders from Emerson for liquors; and there was evidence tending to show that when he solicited such orders, and, subsequently, sold liquors to Emerson, Stewart had reasonable cause to believe, and did believe, that Emerson intended to resell them at his saloon in Manchester. Not long after one of these visits, on which occasion he had solicited such orders, Emerson ordered liquors of Stewart by letter (not, however, in pursuance of any previous contract or understanding); and the liquors so ordered were delivered by Stewart to a carrier in New York, directed to Emerson at Manchester, N. H., and were duly received by Emerson.

It does not appear as a matter of fact, that Stewart, when he solicited the orders or sold the liquor, was acquainted with the laws of this State regulating the sale of spirituous liquors; and the court refused to permit the plaintiff to inquire of Stewart whether he did not understand that the sale of liquor in New Hampshire was prohibited except by town agents.

The ruling of the court in this particular was correct. Ignorance of the law would have furnished no excuse to Stewart. Broom's Leg. Maxims, 190. Every man is presumed to know the laws of the country in which he dwells, or in which, if residing abroad, he transacts business. A foreigner, trading in or to this country, is bound to take notice of our laws; and a contract made by him in violation of them will not be enforced in our courts. *Cambiosoco v. Maffit*, 2 Wash. C. C. 98; 1 Bishop on Criminal law, § 375.

The plaintiff contends that Stewart, by coming into this State and here soliciting orders for liquors, knowing that, if purchased, they were to be sold by the purchaser in violation of our law, committed an indictable offence; that he was an aider or an accessory to the offence of selling the liquors by Emerson; that the contract of sale, upon which Stewart claims as a creditor of Emerson, grows out of and is connected with an immoral and an illegal act, and is therefore not to be protected or enforced by our courts; and that Stewart, therefore, is

not, as a creditor of Emerson, entitled to impeach the validity of the alleged sale by Emerson to the plaintiff.

It is an elementary principle that no contract can be enforced, nor any damages recovered, for the breach of a contract or promise which contravenes the principles of the common law, the provisions of a statute, or the general policy of the law. Metcalf on Contracts, 221.

And it is well settled in this State, that the consideration agreed to be paid for spirituous liquors sold without license, cannot be recovered. The sale being prohibited by statute, and the vendor being liable to a criminal prosecution for the selling, the traffic is made illegal, and contracts respecting it cannot be enforced. Wherever an indictment can be sustained for the illegal sale, there the price cannot be recovered. *Smith v. Godfrey*, 28 N. H. 384, and cases cited; *Plumer v. Smith*, 5 N. H. 553; Met. on Contracts, 225.

The reasons which lie at the foundation of these well-established principles are suggested by considerations of sound public policy. The public good and not the defendant's advantage is the controlling consideration. *Beach v. Kezar*, 1 N. H. 185. For I apprehend the moral instincts of courts and juries would naturally revolt against the encouragement of a defence so mean, impudent, and contemptible.

"The objection," says Lord Mansfield, in *Holman v. Johnson*, Cowp. 348, "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff; not for the sake of the defendant, but because the court will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*." The law in such cases leaves the parties where it finds them. Chitty on Contracts, 731; *Bayley v. Taber*, 5 Mass. 286; *Roby v. West*, 4 N. H. 285.

But, generally speaking, the validity of a contract is to be decided by the law of the place where it was made, unless it was agreed, either expressly or by tacit implication, that it should be performed in some other place; and then the general rule is, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. Story on Conf. of Laws, §§ 242, 280; *United States Bank v. Donnally*, 8 Pet. 372; *Wilcox v. Hunt*, 13 Pet. 379; *Andrews v. Pond*, 13 Pet. 65; *Don v. Lippman*, 5 Cl. & F. 13; *Fergusson v. Fyffe*, 8 Cl. & F. 121. Contracts, valid by the law of the place where they are made, are generally valid everywhere, *jure gentium*, and by tacit consent. 2 Kent's Com. (ed. 1866) 454.

And if, in the place where the contract was made, the policy of the

local law would enforce it, it will also be enforced in the jurisdiction to which a party may be compelled to resort for the application of his remedy for a breach of the foreign contract.

This rule, it has been said, is founded not merely in the convenience, but in the necessities of nations and States: for, otherwise, it would be impracticable for them to carry on an extensive intercourse and commerce with each other.

"Jus autem gentium omni humano generi commune est; nam usu exigente, et humanis necessitatibus." 1 Inst. Lib. 1, tit. 2, § 2.

Upon the foundation of this doctrine rests the whole system of sales, agencies, credits, and negotiable instruments; "and," says Judge Story, "no more forcible application can be propounded of this imperial doctrine, than to the subject of international private contracts." Story's Conf. Laws, § 242.

With peculiar cogency does the doctrine apply to the positive necessities of a country like ours, composed of thirty-seven distinct sovereignties, in strictness wholly independent of each others' local laws, but most essentially dependent for their general prosperity upon the deference, respect, and regard for each others' peculiar policy which the comity of nations demands.

But there is an important exception to the rule, consisting in this: that no nation or State is bound to recognize or enforce contracts which the Government of such State or nation may deem injurious to its own interests or the welfare of its own people, or which are in fraud and violation of its own laws. Such contracts are considered as nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made. Story's Conflict of Laws, § 244; *Andrews v. Pond*, 13 Pet. 65.

The exception is important, notwithstanding the imperative necessity which lies at the foundation of the rule; for, while the comity of nations and States will always regard with respect and consideration the laws and customs of other communities, still its own interests and the welfare of its own citizens will nevertheless be held by every State in paramount consideration. One of the most difficult questions, therefore, with which the courts of the various States composing the Federal Union have to deal, is precisely that now presented: namely, To what extent will the courts go in sustaining an exception that takes out of the general rule and invalidates a contract sought to be enforced here, which, though entirely legal in the jurisdiction where the contract was made, is regarded, in this State, as contrary to morality or the provisions of our local statute?

Viewed in the light of all these suggestions, the principal question presented is, whether the evidence which shows that Stewart knew or had reasonable cause to believe that Emerson, at the time of the sale to him, intended to transport the liquors into this State, to be here kept and sold in violation of our laws, would constitute a defence, if the present suit were brought by the vendor against the vendee to recover the price of the liquors.

In considering this matter, we are not for a moment to lose sight of, nor to underrate the importance, the imperative necessity for the enforcement of the rule; and we are to admit no given case within the exception, unless by the compulsion of a necessity demanded by local policy or positive law.

It is claimed by the plaintiff that the present case falls within the exception.

The case of *Smith v. Godfrey*, before cited, must be regarded as decisive to a certain extent of the questions involved in this inquiry; and as fully sustaining the ruling of the judge at the trial term, in refusing to give the *first* branch of the instructions desired by the plaintiff. It is there held that "bare knowledge on the part of the vendor of goods that they are to be sold in another State contrary to the laws of that State, will not make the sale of the same illegal in the State where the sale is not prohibited." It is also there held that the price of goods sold and delivered in a State where such sale is legal, and where nothing remains to be done by the vendor to complete the transaction, and he is not in any way to be further connected with it, may be recovered in this State, where such sale would be illegal. "Aliter, if it be an ingredient in the contract that the goods shall be illegally sold, or that the seller shall do any act to assist or facilitate the illegal sale."

In the present case, it is conceded that the sale by Stewart to Emerson was consummated in New York, that the goods were there delivered to Emerson's agent and that the sale was not in violation of the laws of that State.

The only remaining question then is, whether this case is brought within the exception alluded to, because of the mixture of any ingredient in the original contract of sale providing that the goods should be illegally sold by Emerson, or by any act of Stewart, aiding, assisting, or facilitating the illegal sale in this State. But there is no evidence that the contract of sale between Stewart and Emerson was complicated by any "ingredient" concerning the subsequent disposition of the liquors by Emerson; and the "act" of assistance or facilitation of a subsequent illegal sale by Emerson was neither more nor less than this: "On at least one occasion when Stewart was at the saloon, he virtually solicited orders from Emerson for liquors," *believing*, at the time, that Emerson intended to re-sell them at his saloon in New Hampshire.

It does not appear, nor is it suggested, that Stewart advised, requested, or encouraged the sale of the liquors by Emerson contrary to law, in any other way than by soliciting him to purchase them; nor that he had any participation in the resale otherwise than by furnishing the liquors to Emerson for a price which does not appear to have been regulated by any consideration relative to the final disposition of the property by Emerson. Stewart's connection with the transaction terminated with his delivery of the goods to the carrier, an agent of Emerson, in New York. It does not even appear that Stewart had

any actual knowledge of Emerson's purpose or intentions with regard to the disposition of the liquors.

The authorities bearing more or less directly upon the subject before us, are quite numerous and somewhat conflicting. . . .

There can be no doubt that the plaintiff's general proposition is sound — that the mere *soliciting* another to commit an indictable offence is itself indictable, — *The State v. Avery*, 7 Conn. 267; and also that the inciting, encouraging, and aiding another to commit a misdemeanor is itself a misdemeanor, — *Russ. on Crimes* 46, 47; but it is one thing to solicit a person to *buy* liquors in the ordinary course of lawful trade, and another and very different thing to solicit him to *sell* them in violation of law; see *Finch v. Mansfield*, 97 Mass. 89. And it is one thing to furnish a person, by means of a lawful sale and purchase, with articles which the purchaser *may*, and probably will, apply to an improper use, and another and very different thing to incite, aid, and encourage the purchaser in committing an offence against law, with or by means of the property which he *may* use for lawful and proper purposes.

It is not spirituous liquors only, but innumerable kinds of merchandise, which *may* be applied to improper and unlawful uses. And it would be wholly impracticable, as well as unwise and unjust (because restraining to an unreasonable extent the trade and commerce of the country), to require the vendor of all sorts of merchantable goods to scrutinize the plans and purposes of the purchaser with regard to the use of the commodity, and to sell only at the peril of forfeiting the price in every case where a jury might find that the seller had reason to suppose the purchaser intended to make an improper or unlawful use of the article.

Considerations of local policy, of good morals, of the safety of society, and the protection of our own citizens are not to be disregarded; but they are to control and make subservient the interests of commerce and the comity of States, only when these considerations are of unquestionable preëminence. The requirement of what is too loosely termed public policy must be imperative, admitting of no doubt. Till such be the acknowledged case, the reason, logic, precedent, and authority of the law must supersede and ignore any mere system of moral principles, however pure and attractive, or however efficient in the abstract it may seem, for the proper regulation of the actions and manners of men. . . .

Our conclusion will have been anticipated; but it is proper to make a brief practical application of the foregoing considerations.

Stewart resided in New York, and carried on there a lawful business. In the regular course of trade he filled orders for liquors, selling and delivering them in the State of New York, as he might lawfully do. But, when he sold these liquors, he had reason to believe and did believe that Emerson intended to resell them in New Hampshire; and, doing business here, he was bound to take notice that such resale

of the liquors by Emerson here would be unlawful. Still, it seems to us too clearly settled to be disputed, that the contract of sale was not invalidated by reason of Stewart's mere knowledge of Emerson's unlawful designs.

Stewart's offence, then, which is said to taint and corrupt the contract of original sale, consists solely in soliciting the purchase of these liquors, with knowledge that, if purchased, Emerson would be likely to resell them contrary to law.

But Stewart did not solicit such a disposition of the liquors by Emerson; the liquors were not sold to him with a view to such disposition, or to any disposition of them by Emerson. Stewart neither derived nor contemplated any advantage from Emerson's unlawful dealings with the goods; the payment for them was not dependent upon, nor the price enhanced by, any considerations relating to Emerson's use of them. His solicitation was that of traders in their general practice, as expressed in their advertisements and circulars — "Your patronage is respectfully solicited" — and Stewart's connection with the matter terminated with the delivery of the goods to Emerson's agent in New York.

We are of the opinion that this solicitation, accompanied by the vendor's knowledge of Emerson's course of business and his belief that these liquors would probably be disposed of in accordance with that course of business, does not bring the case within the rule, whereby contracts affected by illegal considerations have been invalidated, nor, as we think, does it come within the principle which lies at the foundation of those wholesome maxims of the law which this plaintiff has invoked; none of which are infringed or sought to be impaired by this decision.

Moreover, we cannot lose sight of the fact that there is no evidence, and of course there can be no presumption in law (but rather the contrary), that these liquors were resold by Emerson at all. They may have been used, contrary to the original intent of the purchaser, for personal or family use, or for lawful chemical or mechanical purposes, by the vendee, or they may have been taken by him to a State where the sale of such goods was not prohibited by law.

"Intention," says Mr. Justice Smith, in *Bell v. Woodward*, 47 N. H. 540, "is subject to change; and a naked intention, where no act has been done, is not admissible as tending to show a probability that the intention will thereafter be carried into effect."

We are bound to look at the contract alone, quite independent of subsequent transactions growing out of it. The contract was ended when Stewart delivered the goods; and subsequent dealings with the property by Emerson or others, either in furtherance of or contrary to the original design of the purchaser, cannot relate back to the original sale, and make that illegal which, at the conclusion of the original contract, was not illegal.

Suppose the vendor understands that the vendee wants the liquor for

an honest and lawful purpose. Still he puts into his hands the means of violating the law. The buyer in fact intends to, and does, violate the law. Clearly the sale would be legal and valid. Shall the vendor's misunderstanding of the purchaser's intentions, then, taint the original contract by retroaction?

Suppose again, that, for the sake of the argument, we concede that mere knowledge of an existing intention to violate the law by the purchaser renders the contract of sale void. The illegal sale by the original vendor is made; the contract is ended; it is a void contract. But the purchaser changes his mind, becomes converted to the wholesome doctrine of temperance, and destroys the liquor, or uses it for lawful purposes. Does the subsequent diversion of purpose by the purchaser relate back to the original contract, so that now the original vendor can invoke our aid to recover the price fixed by the original invalid and unlawful sale?

Not only upon authority, but upon correct principle, we are compelled to disallow the plaintiff's positions. The substance of the decision in *Smith v. Godfrey* is, that the vendor's claim to recover for the price of spirituous liquors, sold with knowledge of the purchaser's intention to resell them contrary to law, will not be denied, unless it be "an ingredient in the contract that the goods shall be illegally sold, or that the seller shall do some act to assist or facilitate the illegal sale."

The present case does not differ from that, unless the mere solicitation by Stewart shall be regarded as an ingredient in the contract that the goods shall be illegally sold, or unless such mere solicitation shall be considered an act assisting or facilitating the subsequent illegal sale.

The term solicitation, here, cannot have any forced or unusual meaning. There is scarcely ever a sale and purchase among traders, without solicitation by the seller. We are unable to regard the circumstance of such solicitation as of any importance whatever, as affecting the subsequent contract of sale by Stewart, much less the later disposition of the goods by Emerson.

It has been urged in argument that the moral sense of this community requires us to place this case within the exception to the rule of comity which is ordinarily applied to foreign contracts, and to apply to the sale of spirituous liquors the principle which should be applied in the case of the sale of a deadly poison to a murderer, with knowledge of his intentions.

We have no disposition to discountenance or oppose the doctrine of the immorality or the positive sinfulness of the indiscriminate sale of spirituous liquors, even if this were, as it is not, the appropriate place or tribunal for considerations of this character. But the remedy for the suppression of intemperance cannot be afforded by courts of law, at the sacrifice and violation of established legal principles and rules. The philanthropy of the courts is not to be exemplified by despotism and the exercise of arbitrary power. Courts act in the forms and by the rules of law, expressed by legislative will; and when the plaintiff,

here, tells us that the course of legislation in this State, by its expression of repugnance to the traffic in spirituous liquors, calls upon us, by judicial power, to annul this contract, we cannot agree with him; but our reply is, such legislative expression is *not* given. Year after year, and step by step, the legislators of this State have proceeded with their enactments relative to intemperance and the sale of intoxicating drinks, mindful of the course of legislation in neighboring commonwealths, borrowing here a little and there a little from the laws of other jurisdictions; avoiding, likewise, in some instances, the example of other legislators.

Zealous reformers, constantly agitating this subject, cannot have been unmindful of the legislation, heretofore alluded to, in Massachusetts and Connecticut, whereby such a sale as this was there made ineffectual, by force of express law.

Nothing could have been easier or simpler than for our legislators to have said, if such had been their will, or such in their judgment the will or desire of their constituents, "No action of any kind shall be had or maintained in any court for the price of any spirituous or intoxicating liquor sold in any other State for the purpose of being brought into this State, to be here kept or sold in violation of law, under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained such illegal purpose." But they did not say it, as Massachusetts and Connecticut did; and having seen fit to stop short of this point in the progress of reform, it cannot be required of the courts that they should go further than the law-makers themselves, and usurp their legitimate functions.

It cannot be said that the public policy of this State forbids the enforcement of this contract, and approves the gross immorality and dishonesty which, alone, could prompt such a defence, when made by the purchaser.

In Massachusetts, as we have seen, the mandate of legislative power was laid upon the courts, with respect to contracts like this; and willingly obedient thereto, such contracts were declared illegal, and parties seeking their enforcement were turned out of court. In 1868 the mandate was withdrawn, the statute of 1855 was repealed, the common law revived, and then the vendor of goods, in a State where the sale was lawful, came to the courts of Massachusetts to recover under such a contract, and under exactly such circumstances as surround the present case, and had his claim allowed.

This court, it is to be presumed, will not be reluctant to execute the laws in the spirit of their purpose and intent. We sit here not to do our own will, nor to make laws; nor to administer them according to our own notions, but by prescribed rules.

The legislature may interfere, if the public good demands more stringent laws. Such enactments as we have referred to in Massachusetts and Connecticut do not, in any degree, conflict with any of those constitutional principles which are established for the protection of private

rights or private property. Cooley on Constitutional Limitations 596, 597; Webster v. Munger, 8 Gray, 587; Reynolds v. Geary, 26 Conn. 179.

But so long as the people do not thus express their will, through the forms of constitutional legislation, we are bound to adhere to the principles which lie at the foundation of our commercial prosperity, and to admit no case within the exception to the rule which those principles have established, unless the demand is enforced by stronger considerations than the present case presents to our minds.

Our conclusion is that there was no error in the refusal to give to the jury the instructions desired by the plaintiff.

Judgment on the verdict.

SARGENT, DOE, and LADD, JJ., concurred.

BELLOWS, C. J., dissenting. . . . The question then is, whether our courts are required, as matter of comity, to enforce a contract made abroad in favor of a citizen of another country, which it would not enforce in favor of one of our own citizens, upon the ground that it was a contract knowingly made to furnish the means of violating a positive law of our own State, and contrary to public policy.

In considering this question, it is readily conceded that the authority of Smith v. Godfrey should not hastily be disregarded or overthrown without the most cogent reasons for it; but there are circumstances to be considered that in my judgment materially diminish its weight at the present time.

That decision was in 1854; and since then the law in respect to the traffic in spirituous liquors has undergone a great change, so that there can now be no question that the traffic in such liquors, contrary to law, is immoral. Immoral, not only because it is a violation of positive law, which is everywhere, of late years, coming to be regarded as of itself immoral; but immoral, because in its consequences it is highly destructive to the peace, good order, and morals of society, the fruitful parent of crime, poverty, insanity, and almost every form of human debasement and suffering. Intemperance, indeed, is the master vice of the age, and imperatively calls for the united exertions of all the wise and the good in the community to find some remedy for its great and growing evils; and I cannot but regard the illegal traffic in spirituous liquors as clearly immoral.

It is also to be observed, that since the decision in Smith v. Godfrey, the case of Cutler v. Welsh, 43 N. H. 497, was decided, settling fully the doctrine that furnishing means to violate a positive law of the State is in itself illegal, though the act is not *malum in se*, and a contract arising out of it cannot be enforced in this State; thus repudiating the doctrine of Faikney v. Reynous, 4 Burr. 2069, and Petrie v. Hannay, 3 T. R. 418, and qualifying materially the doctrine of Holman v. Johnson, Cowp. 341.

Looking at the question in its broadest aspects, it is this: whether

a sale of liquors, made by a citizen of another State, in that State, to a citizen of this State, to be brought here and sold in violation of our laws, the seller knowing that such is the purpose, is to be regarded by our courts as valid and to be enforced.

The purpose of the buyer in this purchase is, to violate our laws, to commit an indictable offence; and the seller knows it. Is he not then himself morally guilty of the same offence, when he knowingly puts into the hands of another the means of committing it?

Does it change the character of the act morally, that when he does so, he stands the other side of the State line, where he fully understands what our law is, and that the offence is to be committed? Does it not come within the strong denunciations of Eyre, C. J., in *Lightfoot v. Tenant*, 1 B. & P. 551, just the same as if he stood on the New Hampshire side of the line?

Take the case of money lent to game with, or weapons furnished to commit a crime with, or to make war on a nation with whom we are at peace: can the character of the act depend on the locality of the State line, whether on the one side or the other of the parties, when making the contract?

In foro conscientiae, it is undeniable that there can be no difference. If the acts were done in this State, it is clear that no court here would enforce a contract growing out of them; and so it would be if done out of the State, but by citizens of this State, as is shown by the cases of *Biggs v. Lawrence*, 3 T. R. 454, and *Clugas v. Penaluna*, 4 T. R. 466.

What principle then of comity requires us to enforce such a contract in favor of a citizen of another State, when his contract is made with full knowledge of its object, and has the same moral taint that would deprive a citizen of our own State of all remedy?

The purpose of the buyer being to break our laws, the seller, having knowledge of it, must be regarded as participating in the offence, — as a party to a sale, made to defraud creditors, is held to participate in that intent if he had knowledge of it, whether he really had any purpose to defraud anybody or not.

And so it is generally in such things, — a person having knowledge of an act of fraud and in any way lending his aid to effect it, is deemed a party to it, whatever his real motive.

As to *Holman v. Johnson*, it is clear that Lord Mansfield considered the contract not to be immoral, and upon the ground that the revenue laws, as well as the offences against them, are all *positivi juris*, and not *malum in se*. His view of the subject is seen in the expression, that no country ever takes notice of the revenue laws of another.

Had that great judge regarded the contract as immoral, there can be no doubt that his decision would have been the other way.

Whatever might have been the view in respect to the breach of a revenue law by a citizen of a foreign country, we can entertain no doubt that it is an immoral act in such citizen to aid in a violation of the laws for the suppression of intemperance, by furnishing the means

to do it; and even in respect to the revenue laws, any aid furnished to facilitate such violation, as by packing the goods in a peculiar way for that purpose, would invalidate the contract.

It is to be observed, also, that the doctrine of *Holman v. Johnson* was applied in a case where, according to the habits of the times, the breach of the revenue laws, especially by a citizen of a foreign country, was regarded as involving less moral turpitude than a breach of almost any other law, although now such distinctions are in law not recognized.

It should also be considered that, owing to the insular condition of Great Britain, a doctrine that might not be productive of great mischief there might be wholly unsuited to a country like ours, consisting of a family of contiguous States, having constant and large intercourse, a common origin, a similarity of laws and institutions, and a considerable familiarity with each others' policy and laws; add to this the fact that they are all united under one general government, and that the citizens of one State are entitled to all the privileges of citizens of the several States, and we have a case where, on a question of this sort, the inhabitant of a contiguous State can hardly be looked upon as a foreigner unacquainted with our laws, but really occupying a position enabling him to contribute to the violation of laws with about the same effect as if he lived among us, and was privileged to supply to everybody the means of breaking our laws. If it be desirable to enforce our laws for the suppression of intemperance, a policy that shall protect a traffic just outside our limits, by which everybody may be supplied with the means of breaking those laws, would be perfectly suicidal.

I am aware that it is said that the person who buys these liquors does not deserve any protection against the claims of the seller; and that is admitted to be true; but this is a totally inadequate view of the subject. It is not for the sake of such buyers, but to suppress an immoral and mischievous traffic by refusing to enforce contracts growing out of it.

So long as this rule in *Holman v. Johnson* is recognized, we shall continue to have upon us an army of liquor dealers in the neighboring States, using all the skill which experience has gathered to induce our citizens to violate the laws, and to teach them how to do it with the best chance of impunity.

From such a power and from such doctrines great mischief is to be apprehended; and I cannot conceive that we are under obligation, as matter of comity, to enforce contracts of that kind. It is a case, indeed, where we are excused upon the ground that the traffic is highly injurious to us.

If the authority of *Smith v. Godfrey* is too firmly established to be shaken, and mere knowledge in the seller is not enough to render the contract invalid, the question then is, whether the coming into this State and soliciting orders for these liquors, or encouraging the defend-

ant to buy and sell the liquors in this State in violation of law, would render such sale invalid.

The coming into this State and soliciting orders for liquors, and encouraging the party to buy and sell contrary to law, is to my mind a more direct participation in the violation of the law, than the packing the goods in a convenient way for smuggling, inasmuch as here is a direct request, or what is equivalent to it, to break the law.

In *Territt et al. v. Bartlett*, 21 Vt. 184, the order for the liquors was given in Vermont, but the sale completed in New York, the seller knowing that they were to be sold in violation of law, — it was held that for all practical purposes it must be considered that the sale was made in Vermont; and the plaintiff could not recover. A similar doctrine was held in *How et al. v. Stewart*, 40 Vt. 145.

In *Aiken v. Blaisdell*, 41 Vt. 655, where the plaintiff forwarded the liquors from New York to defendant, in a disguised form, to evade detection, it was held that he could not recover; the court holding that positive acts in aid of the unlawful purpose, however slight, are sufficient.

In *Wilson v. Stratton*, 47 Me. 120, where orders for liquors were given in Maine, and the goods delivered in Boston, the court speaks in this wise, after saying that plaintiffs could not be ignorant of the existence of their laws prohibiting this traffic. "Yet, in the face of these laws and of the known and settled policy of the State, they send their agents into the State to seduce our citizens to enter into contracts, looking directly to their violation; and after having succeeded by such solicitation in inducing them to enter into such a contract, they come before our courts and ask them, on the principle of comity, to enforce them on the technical ground that they were completed in another State. Such proceedings are manifestly in fraud of the laws of the State, and cannot be upheld upon any sound principle of comity." In *Webster v. Munger*, 8 Gray, 584, it was held that a sale made in one State, with a view to a resale in another contrary to law, is invalid, and would not be enforced in the latter State; and Thomas, J., holds that mere knowledge of the purpose would defeat it. From these cases, as well as the others cited from the law reports, it is evident that the courts, both in England and this country, are disposed to lay hold of slight circumstances to avoid the doctrine of *Holman v. Johnson*; and I think the coming into this State and soliciting orders, and encouraging the sale of liquors contrary to law, is a much more decided participation in the illegal act than many of the cases reported, where it is held to make the seller a party.

If I understand aright the opinion of Mr. Justice Clifford in *Green v. Collins*, 3 Cliff. 494, the distinction he makes is between a case of mere knowledge in the seller, and acts done by him to facilitate the violation of the law; and he illustrates his view by reference to the English case of *Brown v. Bennett*, 1 Camp. 349, where the plaintiff furnished articles of equipage or dress to a female keeping a house of ill-fame, for

the purpose, and of a character, to enable her to make a display ; and he says that the decision was upon the ground that the act of supplying a female engaged in such immoral practices would warrant a jury in finding that the articles were intended to facilitate the objects of her vocation ; and he says that sales under such circumstances may well be presumed to have been made with the intent to facilitate the objects of the purchaser, and if so, then the contract is clearly void.

He also says that different rules have been sometimes applied in the construction of contracts made for the sale of goods in one country, intended to be exported into another in violation of its revenue laws ; but he declines to enter that field of inquiry, as such a question is not raised, although the liquors, the subject of the suit, were sold in Rhode Island to be used in Massachusetts, the sale being valid by the laws of the State where it was made.

If the liquors were sold with the full knowledge that the buyer was to sell them in this State in violation of our laws, a jury could not fail to find that the sale was made to facilitate and aid the buyers in such violation.

What, indeed, could more decisively aid in such breach of the law than to furnish him upon credit with the very means to do it, knowing that they are to be so used.

It would be a reproach to the intelligence of a jury to suppose that they could hesitate so to find it, or to find that this was encouraging the buyer to violate the law.

The fact is, that in all cases where one man furnishes another with the means to commit a crime, knowing that they are to be so used, the law deems him to be a participant in the guilt of the offence ; and this applies in its full force to the case under consideration. Nor is it any answer to say that the original intention of the buyer may be abandoned, and the liquors sold elsewhere, and lawfully ; but if the law is in fact broken, and the seller furnishes the means to do it knowing that they are to be so used, he cannot be excused by the fact that the means *might* have been otherwise used, any more than, in case he had furnished another with arsenic to poison a man, he could be excused by alleging that it might not have been used for the purpose for which it was furnished, or that it might not have been effectual. In truth, when liquor dealers across the line of our State are habitually aiding our citizens in the violation of laws made for the protection not only of the public morals, but of the very lives of our people, there is an impudence in coming to our courts, and asking them to enforce contracts growing out of such traffic, that is almost sublime.

It is obvious that they are doing all they can do to render inoperative a law which the courts are bound to enforce so long as it remains on the statute book ; and then they ask the same courts to protect them in these efforts to break down our laws, by treating their contracts as meritorious and legal.

To do this would be extending the doctrine of comity to a point altogether inconsistent with the public safety.

By our laws no spirituous liquors can be sold here except by agents duly appointed by law; and to ensure the sale of pure liquors only, these agents are required to purchase of persons designated by the governor alone; and those persons are required to give bonds to ensure the furnishing of pure, unadulterated liquors. With a full knowledge of these provisions and in utter disregard of them, liquor dealers across the line systematically endeavor to nullify these provisions, and deprive us of all security against the introduction of adulterated and poisonous liquors; and the argument is, that their conspiracies against our laws are carried on beyond the limits of this State, and therefore we are bound to regard them as not only not illegal, but of such a character that our courts are bound to enforce contracts made to accomplish this nullification of our laws.

If this be so, it is due to a decision made long ago by a very eminent judge in a matter involving few of the moral aspects of the present question, and upon views and doctrines which have since been discarded or modified, and which decision has been, incautiously, as I think, followed in many subsequent cases.

I feel sure, however, that this doctrine cannot stand the test of a careful examination upon principle, and I therefore am ready to hold that comity does not require us to enforce the contract now in question. Upon these views I am compelled to dissent from the opinion of the majority of my brethren.¹

SMITH, J., concurred.

FLAGG v. BALDWIN.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1884.

[Reported 38 *New Jersey Equity*, 219.]

MAGIE, J.² The bill in this case was filed for the foreclosure of a mortgage made by Jennie M. Flagg and William L. Flagg, her husband (who are the appellants), to Abram F. Baldwin (who is the respondent), upon lands in this State, to secure the payment of appellants' bond. The bond and mortgage were dated August 26, 1880. The bond was in the ordinary form of a money obligation and was conditioned for the payment to respondent of \$11,563.44, with interest, on demand. The mortgage recited that it was intended to secure the

¹ In accordance with the opinion of the majority, see *Webber v. Donnelly*, 33 Mich. 468. *Contra*, *Webster v. Munger*, 8 Gray, 584 (but see *Frank v. O'Neil*, 125 Mass. 473); *Terrill v. Bartlett*, 21 Vt. 184. If the agent of the seller, cognizant of the buyer's illegal purpose, solicits the order within the State, no recovery can be had though the sale was valid where made. *Wilson v. Stratton*, 47 Me. 120; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384. — Ed.

² Part of the opinion is omitted. — Ed.

money which appellants had so bound themselves to pay, and that the amount of \$11,563.44 was made up of \$7,563.44, which was therein declared to be then due from appellants to respondent, and of \$4,000 to be security for future advances.

From the proofs it appears that the sum of \$7,563.44, so admitted to be due from appellants to respondent, was made up of different sums. One sum represented the loss which had been incurred by Mr. Flagg in a stock speculation which had been carried on by him and one Ripley with respondent, a stockbroker in New York. Another sum represented losses incurred by Mr. Flagg in a like speculation carried on by him and respondent in joint account. Another sum represented losses incurred in a like speculation originally carried on by Mr. Flagg with respondent and afterwards transferred to and carried on by Mrs. Flagg (under the control and management of her husband) with respondent. The losses thus incurred were the result of stock dealings for these respective parties upon a margin sometimes put up in cash, and in Mrs. Flagg's case in her own note, which represented her margin.

The \$4,000 of future advances were designed and intended as a margin for a continuance of the stock speculation of Mrs. Flagg, to be carried on in her name under the management of her husband with respondent, and the advances contemplated by both parties were such as would cover and make good her losses therein, if any.

Respondent's books show that the bond and mortgage were credited to Mrs. Flagg's account for the sum of \$11,563.44, and that account had been charged with the previous losses. It appears further that the speculative stocks carried in that account have all been closed out with the result of leaving a balance in Mrs. Flagg's favor of \$653.93. Since the mortgage entered into the account, the effect is that there is due thereon the sum of \$10,909.51, with interest, and its foreclosure and the sale of the mortgaged premises must be conceded unless some of the defences are sustained.

The main defence goes to the validity of the bond and mortgage, and contests them on the ground that the contracts out of which they arose were wagering contracts and illegal and void, and that the bond and mortgage securing an indebtedness arising solely from such cause are tainted with the same illegality and cannot be enforced.

In coming to the consideration of the question thus raised, it is obvious that it is important to determine at what place the contracts contested were made. For if they are New Jersey contracts and subject to our law, the sole question is whether they are such contracts as are declared unlawful by the "act to prevent gaming." Rev. p. 458. While if they are contracts of another place, it must be preliminarily determined whether they are objectionable by the laws of the place of contract; or if not, whether they will still be enforced by our courts.

The evidence seems to leave no room for doubt that the contracts in question are contracts made and to be performed in the State of New

York. The transactions anterior to the execution of the bond and mortgage took place wholly within that State. By the bond and mortgage the parties averred they resided in that State. The mortgagee did, in fact, reside there. The mortgage was acknowledged there. Delivery of the papers was made, and the remaining transactions took place there. Although the mortgage affected lands in this State, the above-stated facts establish, according to a long line of decisions, that the contracts were New York contracts. *Cotheal v. Blydenburgh*, 1 Hal. Ch. 17; s. c., 1 Hal. Ch. 631; *DeWolf v. Johnson*, 10 Wheat. 367; *Dolman v. Cook*, 1 McCart. 56; *Campion v. Kille*, 1 McCart. 229; s. c., 2 McCart. 476; *Atwater v. Walker*, 1 C. E. Gr. 42.

Where contracts of a particular kind are forbidden by the law of the State in which they are sought to be enforced, and the party seeking to enforce them relies on the fact that they were made in a foreign State and are valid contracts by the *lex loci contractus*, it has been held elsewhere that he is bound to aver and prove those facts. *Thatcher v. Morris*, 11 N. Y. 437.

But the rule which seems to have been established in this State requires one who defends against a foreign contract, if he relies on its being invalid by force of the *lex loci contractus*, to both set up and prove the foreign law. *Campion v. Kille*, *ubi supra*; *Dolman v. Cook*, *ubi supra*; *Uhler v. Semple*, 5 C. E. Gr. 288.

We have, then, to deal with transactions which took place within the State of New York and must be presumed to be governed by the laws of that State. Whatever may be the rule respecting the burden of setting up and proving the law of the foreign State under such circumstances, neither appellants nor respondent have furnished in their pleadings or proofs any information on the subject. In the absence of proof of the law of another State, the better opinion is that, at least with respect to States comprised in the territory severed from England by the revolution, the presumption is that the common law prevails. *White v. Knapp*, 47 Barb. 549; *Stokes v. Macken*, 62 Barb. 145; *Holmes v. Broughton*, 10 Wend. 75; *Thurston v. Percival*, 1 Pick. 415; *Shepherd v. Nabors*, 6 Ala. 631; *Walker v. Walker*, 41 Ala. 353; *Thompson v. Monrow*, 2 Cal. 99; *Inge v. Murphy*, 10 Ala. 885; *Norris v. Harris*, 15 Cal. 226; *Titus v. Scantling*, 4 Blackf. 89; *Crouch v. Hall*, 15 Ill. 263; *Brown v. Pratt*, 3 Jones (N. C.) Eq. 202.

By the common law, contracts of wager and similar contracts were not objectionable *per se*. They were, in fact, enforced by the courts without any objection on the score of being dependent on a chance or casualty. Courts did, in some instances, refuse to enforce such contracts, but only when the subject of the wager was objectionable, as tending to encourage acts contrary to sound morals (*Gilbert v. Sykes*, 16 East, 150); or being injurious to the feelings or interests of third persons (*De Costa v. Jones*, Cowp. 729); or against public policy or public duty (*Atherfold v. Beard*, 2 T. R. 610; *Tappenden v. Randall*, 2 B. & P. 467; *Shirley v. Sankey*, 2 B. & P. 130; *Hartley v. Rice*, 10 East, 22).

It has not been urged, nor does there seem to be ground for contending, that the transactions in question were such as by the common law would not be enforced.

We are therefore required to determine whether these contracts, made in the State of New York, and presumed to be governed, as to their validity, by the doctrines of the common law and not objectionable thereunder, are to be enforced in this State.

The common law under which such contracts were enforceable has been here altered by the passage of the act against gaming above referred to. By the first section, all wagers, bets, or stakes, made to depend on any lot, chance, casualty, or unknown or contingent event, are declared to be unlawful. By the third section, all bonds, mortgages, or other securities made or given, where the whole or any part of the consideration shall be for money laid or betted in violation of the first section, or for repaying money knowingly advanced to help or facilitate such violation, are declared to be utterly void.

If the contracts now sought to be enforced would be obnoxious to these provisions of our statute, if made in this State, are we to enforce them because made in New York, where we are bound to presume the common law exists unaltered?

The enforcement of a foreign law and contracts dependent thereon for validity, within another jurisdiction and by the courts of another nation, is not to be demanded as a matter of strict right. It is permitted, if at all, only from the comity which exists between States and nations. Every independent community must judge for itself how far this comity ought to extend. Certain principles are well-nigh universally recognized as governing this subject. It is everywhere admitted that a contract respecting matter *malum in se*, or a contract *contra bonos mores*, will not be enforced elsewhere, however enforceable by the *lex loci contractus*. An almost complete agreement exists upon the proposition that a contract valid where made will not be enforced by the courts of another country, if, in doing so, they must violate the plain public policy of the country whose jurisdiction is invoked to enforce it, or if its enforcement would be injurious to the interest or conflict with the operation of the public laws of that country. Story's Conf. Laws, § 244; 1 Addison Cont. § 241; Forbes v. Cochrane, 2 B. & C. 448; Grell v. Levy, 16 C. B. (N. S.) 73; Hope v. Hope, 8 De G., M. & G. 731; 2 Kent's Com. 475; Bank of Augusta v. Earle, 13 Pet. 519; Ogden v. Saunders, 12 Wheat. 213; Blanchard v. Russell, 13 Mass. 1. This proposition has been announced and applied in our own State. Varnum v. Camp, 1 Gr. 326; Frazier v. Fredericks, 4 Zab. 162; Moore v. Bonnell, 2 Vr. 90; Bentley v. Whittemore, 4 C. E. Gr. 462; Watson v. Murray, 8 C. E. Gr. 257; Union L. & E. Co. v. Erie R. Co., 8 Vr. 23.

Since the courts of each State must, at least in the absence of positive law, determine how far comity requires the enforcement of foreign contracts, it results that there is contrariety of view, and the proposi-

tion above stated is not universally admitted. Thus, in New York, a contract made in Kentucky, under a law of that State, establishing a lottery for the benefit of a college, was upheld, notwithstanding the law of New York prohibiting lotteries. *Com. of Ky. v. Bassford*, 6 Hill, 526. Chief Justice Nelson limited the cases of contracts not enforceable, though valid where made, to such as are plainly contrary to morality. He gave no consideration to the doctrine elsewhere settled, that excludes from enforcement contracts opposed to the public policy or violative of a public law of the place of enforcement. In this view, he seems to be sustained by the court of appeals. *Thatcher v. Morris*, 11 N. Y. 437.

So, in Massachusetts, a contract arising out of a completed sale of lottery tickets, in a State where such sale was lawful, was enforced by the courts, although such sale was there prohibited by statute. *McIntyre v. Parks*, 3 Metc. 207. But there was no discussion of principles by the court.

The courts of this State have expressed and enforced different views. Thus, in *Varnum v. Camp*, 1 Gr. 326, the question of the validity of a foreign assignment for the benefit of creditors came before the Supreme Court. The assignment was made in New York, and was assumed to be valid by the law of that State. It created preferences, and by the law of this State was fraudulent and void. The assignment was held unenforceable here. Chief Justice Ewing, whose opinion was adopted by the court, puts the decision distinctly upon the ground that the assignment was one in violation of the policy of our laws, in hostility with their provisions, and which they declared to be fraudulent and void. In *Bentley v. Whittemore*, 4 C. E. Gr. 462, a similar question arose in this court, and the doctrine of *Varnum v. Camp* was restated and affirmed. The application of the doctrine was, however, limited to the protection of the residents and citizens of this State, for whose benefit its public policy was held to be adopted. With respect to non-residents, or citizens of other States, it was held that comity would require the recognition of foreign assignments if valid where made. *Watson v. Murray*, *ubi supra*, was the case of a bill filed for an account of a partnership transaction in a lottery in another State, where such a transaction was claimed to be lawful. The bill was dismissed on the advice of Vice Chancellor Dodd. His conclusion was that such a transaction, though valid where made, should not be enforced here, because it was in violation of a public law of this State, and within the exceptions to the rule of comity requiring the enforcement of foreign contracts. He further argued that lotteries are not only illegal, but are to be judicially considered to be immoral. It is unnecessary to determine how far that view can be sustained. But with the conclusion arrived at I unhesitatingly agree. It is in accord with the decisions in *Varnum v. Camp* and *Bentley v. Whittemore*. It seems to me that no court can, on full consideration, deliberately adopt a rule that will require the enforcement of foreign contracts, violative

of the public laws and subversive of the distinct public policy of the country whose laws and policy they are bound to enforce. No *comitas inter communitates* can compel such a sacrifice.

The limitations on the rule laid down in *Bentley v. Whittemore* do not come in question in this case. It appears that Mrs. Flagg was, in fact, a resident of this State at the time these contracts were made, and there is nothing to show a change of residence.

We are brought, then, to the question whether our law against gaming is such a public law and establishes such a public policy as to require us to refuse to enforce foreign contracts in conflict with it, in a case like that under consideration. I think this question must be answered in the affirmative.

It is true that, in *Dolman v. Cook* and *Campion v. Kille*, *ubi supra*, foreign contracts, valid by the law of the State where made, were enforced here, although by our law they were usurious and declared to be void. No consideration seems to have been given to the question whether our usury law was such a law and evinced such a public policy as required us to refrain from enforcing foreign contracts in conflict with it. As we have seen, that consideration led our courts to reject foreign assignments violative of our laws, where the interests of our own citizens were concerned. But a plain distinction at once presents itself between a usury law and a law regulating assignments for the benefit of creditors, or a law against gaming. One affects only the parties to the contract, and is framed for the protection of the borrower. The others relate to the public or classes of the public who are interested therein and affected thereby.

But our law against gaming goes further than to merely prohibit the vice or avoid contracts tainted with it. It declares it unlawful, and so puts the contracts beyond the protection of the laws or the right of appeal to the courts. The reason and object of the law are obvious. The vice aimed at is not only injurious to the person who games, but wastes his property, to the injury of those dependent on him, or who are to succeed to him. It has its more public aspect, for if it be announced that a trustee has been false to his trust, or a public officer has embezzled public funds, by common consent the first inquiry is whether the defaulter has been wasting his property in gambling.

In my judgment, our law against gaming is of such a character, and is designed for the prevention of a vice, producing injury so widespread in its effect, the policy evinced thereby is of such public interest that comity does not require us to here enforce a contract which, by that law, is stigmatized as unlawful, and so prohibited.

It remains to determine whether the enforcement of these contracts will conflict with the provisions of this statute and the public policy thereby established. If so, it must be for the reason that the mortgage secures an indebtedness arising out of transactions that are wagers.

In considering this question, care should be taken not to trench upon legitimate and proper enterprises. The act is not intended to interfere with the right of buying and selling for speculation.

The line is to be drawn between what is legitimate speculation and what is unlawful wager. When property is actually bought, whether with money or with credit, the purchaser and owner may lawfully hold it for a future rise and risk a future fall. With such transactions, the law does not pretend to interfere. They are within the line of lawful speculation.

But when, either without any disguise or under a guise which simulates such legitimate enterprises, the real transaction is a mere dealing in the differences between prices, *i. e.*, in the payments of future profits or future losses, as the event may be, then, in my judgment the line which separates lawful speculation from illegal wagering is crossed, and the contract, under our law, becomes unlawful, and the securities for it void. . . .

My conclusion is that these transactions, so far as affected by our law against gaming, are to be examined, to discover their real nature, and if, however unobjectionable their form may be, the real contract is merely in respect to differences, the contract is a wager, both void and unlawful.

On examining the transactions in question in this cause, with a view to discover their real character, I am compelled to the conclusion that, however they may have been made to imitate real transactions, they were in fact mere wagers. It never was contemplated, intended, or agreed, by either party, that the stocks purchased or sold were to become or to be treated as the stocks of appellants. The real contract disclosed by the evidence was to receive and to pay differences. . . .

As I interpret the transactions, respondent, in consideration of commissions and interest on advances, agreed to buy and hold stock in anticipation of a rise; or to sell stock of his own, or borrowed for that purpose, in anticipation of a fall. The agreement required him to pay the profits of the transaction, which would otherwise be his, to appellants. On the other hand, appellants, in consideration of his thus carrying the stock bought, or providing the stock sold, agreed that in case of a rise or fall to a certain amount, the stock should be closed out, and the loss, which otherwise would fall on respondent, should be paid by them to him. The bargain contained all the elements of a wager. It is not less a wager because one of the parties obtained a guaranty for the performance of the bargain by the other party.

For these reasons my conclusion is that the transactions in question were wagers within the meaning of our law; that the securities given for them would be absolutely void if the contracts were made in this State; that although made in a foreign State, and not objectionable by the law which must be presumed (in the absence of proof) to govern them, they will not be, and ought not to be, enforced in this State, be-

tween these parties, because to enforce them would be opposed to a public policy on this subject of the vice of gaming, perspicuously shown by our law on that subject.

The decree below must be reversed, and a decree entered dismissing the bill. Appellants are entitled to their costs.¹

HOPE v. HOPE.

CHANCERY. 1857.

[*Reported 8 De Gex, Macnaghten & Gordon, 731.*]

THIS was an original hearing of a demurrer by the defendant, John Adrian Hope, to an amended bill filed by his wife, Mathilde Emilie Hope. The substance of the case stated by the original bill was as follows :—

The marriage between the plaintiff, who was a Frenchwoman, and the defendant, who was an Englishman, took place, in 1845, in England. For some years after the marriage the husband and wife resided in France, where they became domiciled, and where their five children were born. In consequence of differences which arose between the plaintiff and the defendant, the latter, in the early part of 1853, sent all the children to England; but on the 21st of May in that year the two youngest, Adrian Elias and John Henry, were allowed by the defendant to be taken back to France, and were restored to Mrs. Hope. Proceedings took place before the French tribunals with respect to the custody of the children, and in August, 1853, the plaintiff instituted a suit against her husband in the Consistory Court of London in order to obtain a decree of divorce on the ground of cruelty and adultery, to which Mr. Hope filed a responsive allegation. On the 11th of November, 1853, the five infant children filed a bill in chancery by their next friend, praying that Mrs. Hope might be ordered to deliver up Adrian Elias and John Henry to their father in order that they might be brought up and educated in England, and on the 7th of June, 1854, the Lord Chancellor made an order in that suit that Mr. and Mrs. Hope should take all such steps as might be necessary and proper according to the law of France to cause the children to be delivered up to their father, but that he should permit Mrs. Hope to have access to them at all reasonable times (See 4 De G., M. & G. 329). Mrs. Hope presented a petition of appeal to the House of Lords from this order. In the meantime, by a decree of the Cour de Première Instance at Paris, dated the 21st of December, 1854, it was directed that the order

¹ *Acc. Pope v. Hanke*, 155 Ill. 617, 40 N. E. 839; *Lemonius v. Mayer*, 71 Miss. 514, 14 So. 33; *Watson v. Murphy*, 23 N. J. Eq. 257; *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611. *Contra, Quarrier v. Colston*, 1 Phil. 147. — Ed.

of the Lord Chancellor should be carried into execution, but that pending Mrs. Hope's appeal the children should be placed at a school in Paris, where both their father and mother should have liberty to see them. Mrs. Hope appealed against this order to the *Cour Impériale*; but before either appeal came on to be heard an arrangement was made between her and her husband for the settlement of all matters in dispute, and ultimately an agreement was drawn up in the French language, which was executed by Mrs. Hope at Paris, on the 20th of March, 1855, and by Mr. Hope in London on the 22d. The bill set out a translation of the agreement, which was in the following terms:—

“By a judgment delivered by the Civil Tribunal of the Seine, dated 27th December, 1854, it was declared that there should be executed in France a judgment of the Lord Chancellor of England, which ordered that Mrs. Hope should be bound to deliver up to Mr. Hope the two sons issue of their marriage, Messrs. Adrian Elias and Jean Henry Hope. Mrs. Hope has appealed against this order; but, for the purpose of putting an end to these painful proceedings, the following terms have been entered into by the parties: 1. Mrs. Hope will immediately deliver up to Mr. Hope Mr. Adrian Elias Hope; Mr. Jean Henry Hope will remain under the care of his mother. 2. Mrs. Hope will abandon her suit for a divorce instituted against Mr. Hope in the English courts, and for that purpose she binds herself to sign without delay all such deeds and documents as may be required. 3. Mrs. Hope undertakes not to oppose the suit for a divorce instituted against her by Mr. Hope in the English courts, but on the contrary to facilitate the obtaining such divorce. It is well understood that Mrs. Hope shall be able to see her children, to write to them, and to receive letters from them. 4. Mr. Hope agrees to pay in France to Mrs. Hope the annual sum of 75,000 francs in accordance with the decision of the Ecclesiastical Court, to be paid quarterly and in advance. 5. Mr. Hope undertakes to pay, firstly, the expenses incurred in England by Mrs. Hope, and secondly, Mrs. Hope's debts in France, but on condition that such debts shall not exceed the sum of 60,000 francs. These payments shall be made by the hands of Mr. Hope's agents. 6. With regard to any accounts that may be unsettled between Mr. and Mrs. Hope, as well as the handing over to her any articles that may belong to her, the parties agree to leave the matter to be settled by Messrs. Paillet & Duvergier, whose decision shall be final.”

In pursuance of this agreement the plaintiff brought Adrian Elias Hope to England and delivered him up to Mr. Hope, John Henry remaining with her at Paris, and she withdrew her appeals both in this country and in France. Mrs. Hope's suit in the Ecclesiastical Court and the responsive allegation of Mr. Hope were both dismissed.

The bill went on to allege that the plaintiff had in all respects performed her part of the agreement, but that the defendant had refused to perform his part of it; that he refused the plaintiff all access

to the children, though she had frequently desired to visit them, and that he had paid no part whatever of the promised annuity, of the costs incurred by the plaintiff, or of the sum on account of her debts. The bill prayed a specific performance of the agreement of March, 1855, that the plaintiff might have access to her children at all reasonable times, that an account might be taken of the arrears of the allowance stipulated for by the agreement, and that the defendant might be ordered to pay such arrears and to give security for future payments and to pay the cost of the suit.

The defendant demurred to this bill for want of equity, and the Master of the Rolls overruled the demurrer (22 Beav. 351). An appeal by the defendant came to be heard before the Lords Justices in July, 1856, and their Lordships having intimated an opinion that if the demurrer were allowed leave must be given to amend, it was arranged that the demurrer should be allowed without prejudice to any question and with leave to the plaintiff to amend her bill, and that if the defendant should demur again the demurrer should be brought directly before the Court of Appeal.

The bill accordingly was amended by introducing statements to the following effect: That the defendant resided in England, and that by his refusal to perform his part of the agreement the plaintiff was reduced to destitution — that if proceedings could be instituted in the courts of France the defendants would be decreed to pay the allowance and the other sums mentioned in the agreement. That it was the intention of both parties that the agreement should be valid and binding on both of them in England as well as in France, and that the plaintiff had acted on the faith of its being so binding. That by the French law regard would be had to the circumstances under which the agreement was entered into, and that it would be carried into effect by the French tribunals against the defendant if he were still a resident in that country, and that although Monsieur Paillet, one of the referees named in the agreement, had since died, the plaintiff was willing that it should be carried into execution in any manner which the court might direct. The defendant again demurred.¹

TURNER, L.J. This is a suit instituted by a wife against her husband for the specific performance of an agreement entered into between them. The bill has been met by a general demurrer for want of equity. In the course of the argument before us, my learned brother expressed our united opinion, that if the law of this country only was to be taken into consideration in determining the case, the agreement could not be supported, and the demurrer must consequently be allowed, and we stopped the reply upon that point. The further consideration which I have since given to the subject has confirmed me in that opinion.

¹ Arguments of counsel and the concurring opinion of KNIGHT BRUCE, L.J., are omitted. — ED.

But it was argued for the plaintiff, in support of the bill, that in determining this case the law of France ought also to be taken into consideration, — that the agreement in question ought to be considered as an agreement entered into, or, at all events, to be performed in France, — that it is valid and capable of being enforced in France, and that effect ought therefore to be given to it by the law of this country, and upon these points we reserved our judgment.

Upon carefully examining the allegations of this bill, on which alone the case, being before us upon demurrer, must be decided, I think it far from clear that the bill alleges such a case as would in strictness warrant us in taking the law of France into consideration. But I should not feel satisfied to dispose of the case finally upon that ground, and I think it better, therefore, to consider it upon the assumption that the law of France is to be taken into account, and that the agreement in question would, according to that law, be capable of being enforced. Laying aside, then, the allegations of the bill which point to the introduction of the French law into the case, the bill alleges these facts: [His Lordship stated in order the substance of the allegations in the bill.]

No argument was addressed to us on the plaintiff's behalf with reference to that part of the bill which applies to the plaintiff's having access to her children, and seeks for relief in that respect. This part of the plaintiff's complaint, if well founded, is properly the subject of application in the suit in which the order for access has been made. That order having been made, the right given by it and the enforcement of that right cannot, as I apprehend, under any circumstances appearing upon this bill, properly be made the subject of a distinct suit, and the bill can derive no support from the introduction into it of this part of the case. The question is, whether, upon the assumption which I have stated as to the French law being taken into account, the bill can in other respects be maintained. I am of opinion that it cannot, and upon these grounds: I think that when the courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the courts of this country cannot, as I conceive, be called upon to enforce it. Now, there are two provisions of this agreement which, as it seems to me, are contrary to the law and policy of this country. By article 1 of the agreement one of the children is to remain under the care of the plaintiff, the mother. By article 3 of the agreement, Mrs. Hope, the plaintiff, undertakes "not to oppose the suit for a divorce instituted against her by Mr. Hope in the English courts, but, on the contrary, to facilitate the obtaining such divorce." Are these provisions consistent with our laws and policy?

The first of them is in contravention of the order of the Lord Chancellor stated in the bill. It is not only in contravention of that order, but, as I apprehend, is in contravention also of the settled law and policy of the country. The law of this country gives to the father the custody of the children and the control over them, and it gives him that custody and control not for his own gratification, but on account of his duties and with reference to the public welfare. Lord Eldon, speaking upon this subject in *Lord St. John v. Lady St. John*, 11 Ves. 531, says this: "Then how is it as to the children? The father has control over them by the law, as the law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with his wife, who cannot by law contract with him (and in this instance the contract as to the children is between the husband and wife only), it deserves great consideration, before a court of law should by *habeas corpus* upon a unilateral covenant, as the Scotch call it, take from him the custody and control of his children, thrown upon him by the law, not for his gratification, but on account of his duties, and place them, against his will, in the hands of his wife." And again, in *Lord Westmeath's Case*, Jac. 251, Lord Eldon, upon *habeas corpus*, ordered two children of very tender years to be delivered to their father, notwithstanding an express agreement on his part that they should reside with their mother and be educated under her care and superintendence. I know of no authority contravening the doctrine thus laid down and acted upon by Lord Eldon, and I have no doubt, therefore, that this first article of the agreement is repugnant both to the law and policy of this country. That there may be circumstances which would justify such an agreement as this article contains it is not necessary to deny. No such circumstances are alleged by this bill.

Then, as to the 3d article of the agreement. There is nothing which the courts of this country have watched with more anxious jealousy, and I will venture to say, with more reasonable jealousy, than contracts which have for their object the disturbance of the marital relations. The peace of families, the welfare of children, depends, to an extent almost immeasurable, upon the undisturbed continuance of those relations; and so strong is the policy of our law upon this subject, that not only is marriage indissoluble, except by the legislature, but divorces *à mensâ et thoro* are granted only in cases of cruelty or adultery. But what is this article of the agreement? That the wife shall not oppose the husband's suit for a divorce, but, on the contrary, shall facilitate the obtaining it. I can conceive nothing more contrary to the policy of our law than this provision of the agreement. It is, as it seems to me, repugnant to the law, both as to the object which it has in view and the means by which that object is to be effected. Its object is the discontinuance of the marital relations without, so far as appears by this bill, any sufficient cause for the purpose, for the bill states no more than that there was a suit by the plaintiff for a divorce

and evidence taken upon it, and that upon that evidence the responsive allegation, the purpose of which is not stated, was dismissed; and the means by which this object is to be effected are, as I understand this agreement, by evading the due administration of justice in the courts of this country. Much of the argument on the part of the plaintiff was, and most properly, addressed to this part of the case. It was said that the wife's assistance in obtaining the divorce could be of no avail, for that the Ecclesiastical Court would not in such cases act upon the consent of the parties; but there are other modes of rendering assistance than by consent, — modes, too, of which the court may have no cognizance. But then it was said that the whole of the evidence had been taken in the suit, and that there could, therefore, be no deception upon the court; but it is one thing to take evidence, another to dissect and scrutinize it and lay it before the court. It was further said on the part of the plaintiff, that the proposed divorce would amount to no more than a separation, and that the law of this country recognizes separations between husband and wife; but I am very far indeed from being satisfied that the law of this country would recognize a separation upon such an agreement as this between the husband and wife alone, and besides there are consequences which attach to a sentence of divorce which do not belong to a separation by agreement merely. Giving full weight, however, to all these arguments on the part of the plaintiff, they furnish no answer to the objection that this is an agreement for evading the due administration of justice in England.

Lastly, it was urged on the plaintiff's behalf, that whatever objection there may have been to this agreement in its inception, what remains to be performed is legal and unobjectionable; but to hold that an agreement so objectionable as that this court would not perform it, can be rendered capable of performance by the objectionable parts of it having been carried into execution, is a doctrine to which I cannot assent.

Upon these grounds, without entering more into the other points which were argued before us, my opinion is that this demurrer ought to be allowed.¹

¹ *Acc. Grell v. Levy*, 16 C. B. N. S. 7 (champertous agreement); *Rousillon v. Rousillon*, 14 Ch. D. 351 (contract in restraint of trade); *Rogers v. Raines*, (Ky.), 38 S. W. 483 (agreement to pay attorney's fee); *Rowland v. B. & L. Assoc.*, 115 N. C. 825, 18 S. E. 965 (unconscionable agreement). — Ed.

GREENWOOD v. CURTIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1810.

[Reported 6 Massachusetts, 358.]

PARSONS, C. J.¹ This action is assumpsit on a promissory note for the delivery of slaves, and the payment of bars, which are an African currency, and also on an *insimul computassent*. A verdict has been found for the plaintiff, upon a trial on the general issue, subject to the opinion of the court upon a case stated by the parties.

Two objections have been made to the verdict by the counsel for the defendant. That the letters of *Hippias* were improperly admitted in evidence; — and if they were not, that no action can be maintained in this State on a breach of either of the supposed promises.² . . .

The second objection, that no action upon either of the promises alleged can be maintained in this State, is principally relied on by the defendant. The argument of his counsel has been supported with much ingenuity. The slave trade, he has argued, is or has been prohibited by a statute of the Commonwealth, in the preamble of which it has been declared to be an unrighteous commerce; and he attempted to show that in itself it was immoral. This objection deserves much consideration.

By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this State; although such contract may not be valid by our laws, or even may be prohibited to our citizens. Thus in States where a greater rate of interest is allowed than by our statute, a contract securing a greater rate of interest, but agreeably to the law of the place, may be sued in our courts, where the plaintiff shall recover the stipulated interest.

This rule is subject to two exceptions. One is, when the Commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts. — Thus a contract for the sale and delivery of merchandise, in a State where such sale is not prohibited, may be sued in another State where such merchandise cannot be lawfully imported. But if the delivery was to be in a State where the importation was interdicted, there the contract could not be sued in the interdicting State; because the giving of legal effect to such a contract would be repugnant to its rights and interest. — Another exception is, when the giving of legal effect to the contract would exhibit to the citizens of the State an example pernicious and detestable. — Thus if a foreign State allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have

¹ SEDGWICK, J., prepared a dissenting opinion, for which see 6 Mass. 362 n. — ED.

² Only so much of the case as discusses the second objection is given. — ED.

any validity here. But marriages not naturally unlawful but prohibited by the law of one State and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States; such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract. — Another case may be stated, as within this second exception, in an action on a contract made in a foreign State by a prostitute, to recover the wages of her prostitution. This contract, if lawful where it was made, could not be the legal ground of an action here; for the consideration is confessedly immoral, and a judgment in support of it would be pernicious from its example. And perhaps all cases may be considered as within this second exception, which are founded on moral turpitude, in respect either of the consideration or the stipulation.

Before the present case can be compared with this rule, including the exception to it, the merits of it must be ascertained.

In South Carolina it was lawful to purchase slaves on the coast of Africa, and to import them as merchandise into that State. And it does not appear that this purchase and importation was unlawful at Rio Pongos. The original contract was made at Rio Pongos, for the purpose of obtaining slaves to transport to Charleston. The account was stated at Rio Pongos, in which the defendant acknowledged a balance due in cash, which was assented to by the plaintiff in Charleston. Whether either of the contracts is to be governed by the law of Rio Pongos or of South Carolina is immaterial: for in either case it does not appear that either of them was invalid *lege loci*. Either of them, therefore, may be the ground of an action in this State, unless it come within one of the exceptions to the rule, even if a contract of this nature made by the citizens of this State should be void. To maintain the action, if it be not within the exceptions, is enjoined on us by the comity we owe another State. And to entitle the defendant to retain in his hands the debt which he justly owes, as between the parties, he ought clearly to show some principle by which he may defend himself in dishonestly retaining this property.

We do not perceive any injury that could arise to the rights or interests of this State or its citizens, if either of the contracts had been faithfully executed agreeably to the terms of it. It was made abroad, by persons not citizens of the Commonwealth, and to be executed abroad, having no relation in its consequences to our laws.

The defendant therefore, to establish his defence, must bring this case within the second exception; and show that the action, as considered by the laws of this Commonwealth, is a *turpis causa*, furnishing a pernicious precedent, and so not to be countenanced. This upon public principles he is authorized to do, notwithstanding he is a party to all the moral turpitude of the contract.

The argument is, that the transportation of slaves from Africa is an immoral and vicious practice, and consequently that any contract to purchase slaves for that purpose is base and dishonest, and cannot be the foundation of an action here within the principle of comity adopted by the common law. This objection may apply to the counts on the note but not to the count on the *insimul computassent*.

Laying the counts on the note out of the case, we shall consider the objection of moral turpitude, so far as it affects the count on the *insimul computassent*: and we are satisfied that the objection does not apply to the contract averred in this count; there being nothing immoral in the consideration on the plaintiff's part, or in the stipulation made by the defendant.—If a Charleston merchant should send a cargo of merchandise to Africa, for the purpose of there selling it, and with the proceeds to purchase slaves; and if the cargo be accordingly sold, and the purchaser agree to pay for it in slaves; and he afterwards shall refuse or neglect to deliver the slaves, but makes a new agreement with the owner to pay him a sum of money for his cargo, an action can unquestionably in our opinion be maintained on this new contract; and the illegal contract, being annulled or void, cannot affect it.—So, if the purchaser had delivered a part only of the slaves to the merchant, and afterwards agrees with him to pay the balance in cash, we see no objection to an action to recover this balance in cash, if the purchaser refuse to pay it.

In the present case the defendant having delivered a part only of the slaves, and having become a creditor of the plaintiff for supplies furnished to his use, states his account, in which after deducting the slaves delivered and the supplies furnished, he acknowledges a balance in cash, and the plaintiff, having assented to the account, demands the balance in this action we see no legal objection to his recovery. The consideration of the implied promise arising from this settlement is the sale of the cargo, which involves in it no moral turpitude; neither is the performance of the promise by paying the balance in cash immoral. And although on the same day the defendant, in consideration of this balance due in cash, promises by his note to discharge it principally in slaves, and the small remainder in cash; yet this promise is no bar to an action by the plaintiff on the account, even if the promise by the note is here considered as legal and *a fortiori* if it is considered as void for its immorality.—It is true if the defendant voluntarily discharged the note, the balance of the account could not afterwards be recovered, for the consideration of it was discharged by the payment of the note: nor could the payment of the note be recovered back, for *potior est conditio possidentis*.

In this case the defendant having acknowledged a balance of cash in his hands, the property of the plaintiff; although it came into his hands from the sale of the merchandise, for which he was to

pay in slaves, but did not, this balance as between the parties is justly due the plaintiff; and unless the principles of public policy against the action upon the *insimul computassent* are manifest, we cannot decide that the defendant shall not be held to pay what he justly owes.

In this view of the case we are satisfied that the action is maintained on the *insimul computassent*, and that the plaintiff may take his verdict on that count, and have judgment entered upon it.

*Judgment according to verdict.*¹

FONSECA v. CUNARD STEAMSHIP CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 153 Massachusetts, 553.]

THE plaintiff took passage on the defendant's steamer from Liverpool to Boston. He had with him on the ship his trunk, containing articles of clothing and personal property reasonable and proper for an ocean traveller to carry as personal baggage, all of which were entirely ruined on the voyage by the negligence of the defendant. When the plaintiff engaged his passage in London, he received a passage ticket from the defendant's agent there. This ticket consisted of a sheet of paper of large quarto size, the face and back of which were covered with written and printed matter. Upon the back, among other printed matter, was the following: "The company is not liable for loss of or injury to the passenger or his luggage, or delay in the voyage, whether arising from the act of God, the Queen's enemies, perils of the sea, rivers, or navigation, restraint of princes, rulers, and peoples, barratry, or negligence of the company's servants (whether on board the steamer or not), defect in the steamer, her machinery, gear, or fittings, or from any other cause of whatsoever nature."

The judge, upon these facts, found and ruled "that the contract was a British contract; that, by the English law, a carrier may by contract exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff. This has been decided in Massachusetts to be a question of evidence, in which the *lex fori* is to govern; that although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping receipt which he takes without dissent, yet a passenger ticket, even though it be called a 'contract ticket,' does not stand on the same footing, that in this case assent is not a conclu-

¹ *Acc. Roundtree v. Baker*, 52 Ill. 241. — ED.

sion of law, and is not proved as a matter of fact." Upon the whole case, the judge ruled that the defendant company was not exempted from liability by the contract ticket, and found for the plaintiff.

If the rulings were wrong, the verdict was to be set aside, and judgment entered for the defendant; otherwise, the judgment was to be entered on the finding.¹

KNOWLTON, J. . . . We are of opinion that the ticket delivered to plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he assented to its provisions. All these provisions are equally binding on him as if he had read them.

The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy. *Greenwood v. Curtis*, 6 Mass. 358; *Forepaugh v. Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217, and cases cited; *In re Missouri Steamship Co.*, 42 Ch. D. 321, 326, 327; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

*Judgment for the defendant.*²

THE KENSINGTON.

SUPREME COURT OF THE UNITED STATES. 1902.

[Reported 183 *United States*, 000.]

WHITE, J.³ The libel by which this action was commenced sought to recover the value of passengers' baggage which it was alleged the ship had wrongfully failed to deliver. The facts essential to be borne in mind, in order to approach the questions arising for decision, are as follows:—

The International Navigation Company, a New Jersey corporation, on December 6, 1897, at the office of its Paris agency, issued to Mrs. and Miss Bleecker, the wife and daughter of an officer of the United States Navy, a steamer ticket for a voyage from Antwerp to New York on the Kensington, a steamer in the control of the company, advertised to sail from Antwerp on December the 11th. The ticket was delivered to Mrs. Bleecker, who at the time made part payment of the passage money. The baggage of the two passengers was shipped by rail to Antwerp, to the care of the agent of the company there.

¹ The statement of facts has been condensed, and part of the opinion omitted. — Ed.

² *Acc. Forepaugh v. Del. L. & W. R. R.*, 128 Pa. 217, printed *ante* Vol. I. p. 131. — Ed.

³ Part of the opinion is omitted. — Ed.

Mrs. Bleecker, at Antwerp, on the 10th of December, paid the remainder of the passage money, and it was entered on the ticket. The baggage having in the meanwhile been received, the charges which the agent at Antwerp had advanced were refunded and a receipt was issued. It was stated therein that the value of the baggage was unknown, and that it was shipped subject to the conditions contained in the company's steamer ticket and bill of lading. Mrs. Bleecker and her daughter embarked, and the steamer sailed on the 11th of December. The ticket was subsequently taken up by the purser.

The baggage was stowed in what was known as number 2, upper steerage deck. The voyage was an exceptionally rough one, the ship, encountering heavy seas and winds, rolled from 38 to 45 degrees on either side during the height of the gale, and was obliged to heave to for about fifteen hours. On arrival at New York the baggage was found to be totally destroyed. By constant shifting it had been reduced to an almost unrecognizable mass, was commingled with *débris* of broken china and straw, and covered with water. The first was occasioned by stowing crates of china in the same compartment. The presence of the water was explained by the fact that an exhaust pipe which passed through the compartment had been broken by the shifting of the contents of the compartment, and hence the exhaust escaped into the compartment.

There is no possible view which can be taken of the facts by which the loss of the baggage was brought about, by which the ship could be held responsible if the steamer ticket was in and of itself a complete contract, and all the conditions or exceptions legibly printed on the face thereof were lawful. The ticket was signed by the agent of the company at Paris, was countersigned by the agent at Antwerp, but was not signed by either Mrs. Bleecker or her daughter. One of the conditions printed on the ticket provided that there should be no liability to each passenger, "under any circumstances," beyond the sum of 250 francs, "at which such baggage is hereby valued," unless an increased value be declared and an additional sum paid as provided by the condition.

There was no proof tending to show that at the time the ticket was issued the attention of Mrs. Bleecker or her daughter was called to the fact that it embodied exceptional stipulations relieving the company from liability, or that such conditions were agreed to, except in so far as a meeting of minds on the subject may be inferred from the fact of the delivery of the ticket by the company, and its acceptance, and that it contained on its face, in small but legible type, among others, the stipulations which are relied upon. The testimony of Mrs. Bleecker and her daughter was that when the ticket was received it was put aside without reading it, and that it was not subsequently examined before it was delivered to the ship's officer. The District Court held that the loss of the baggage was attributable to bad stowage; that the ticket and the conditions printed on it were a contract binding upon

the parties, so far as the conditions were lawful. The conditions generally relieving from liability for negligence were held to be void, but the stipulation as to the value of the baggage was held valid; recovery was allowed only for the equivalent of 250 francs to each. 88 Fed. 331.

On appeal the Circuit Court of Appeals for the Second Circuit affirmed the judgment. 36 C. C. A. 533, 94 Fed. 885.

The case by the allowance of a writ of certiorari is here for review.

The District Court held, although the condition of the weather might account for the shifting of the baggage, that result could also have arisen from its bad stowage; and, in the absence of all proof by the ship that the baggage had been properly stowed, when such proof was peculiarly within its reach, the loss must be presumed to have arisen from the imperfect stowage. The Circuit Court of Appeals, while in effect agreeing to this conclusion, in addition found that there was proof in the record tending to sustain the conclusion that the baggage had been improperly stowed, and that no proof even tending to rebut this testimony had been offered by the company. As in the argument at bar the conclusion of the court below on this subject was not seriously questioned, we content ourselves with saying that, as a matter of fact, we find them to be sustained, and therefore pass from their further consideration.

The loss of the baggage being, then, attributable to improper stowage, the question is, Was the vessel relieved from the consequence of its fault by the exceptions contained in the passenger ticket? The District Court decided "that a ticket of the character above described for a transatlantic passage is a unilateral contract, and, like a bill of lading, is binding upon the person who receives it, so far as its provisions are reasonable and valid." In other words, the court held, although there was no proof of the meeting of the minds of the parties upon the subject of exceptional limitations to be imposed upon the contract of carriage, the receipt and retention of the ticket implied a unilateral contract embracing the exceptions found in legible characters on the face of the ticket. And being thus a part of the express and written contract, the exceptions would be enforced, provided they were just and reasonable. The Circuit Court of Appeals in effect approved these views of the District Court.

While, apparently, the question whether there was a unilateral contract necessarily arises first for consideration, such is not the case when the situation of the record is taken into view. For should we, in disposing of this question, determine that the rulings of the court below as to the unilateral contract were correct, we would not thereby be relieved from deciding whether the conditions embodied in the contract were valid. On the other hand, should we conclude that the conditions relied on were void, there will be no occasion to determine the question of contract. We hence invert the logical order of consideration, and first come to determine whether the

conditions enumerated in the ticket relieved from the responsibility otherwise resulting from the bad stowage of the baggage. In doing so we shall, of course, assume, for the purpose of this branch of the case only, that the conditions relied upon were a part of a unilateral contract, and were binding as far as they were just and reasonable. It is apparent if the carrier, in transporting the baggage, was governed by the act of February 13, 1893, designated as the Harter Act, any provision in the ticket exempting from liability for fault in loading or stowage was void because inhibited by the express provisions of the statute. 27 Stat. at L. 445, chap. 105. As, however, the view which we take of the conditions expressed in the ticket will be equally decisive, whether or not the Harter Act concerns the carriage of passengers and their baggage, it becomes unnecessary to intimate any opinion as to whether the provisions of the act in question apply to such contracts. The exceptions found on the face of the ticket upon which the carrier depends are as follows:—

“(c) The shipowner or agent are not under any circumstances liable for loss, death, injury, or delay to the passenger or his baggage arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the seas, rivers, or navigation, accidents to or of machinery, boilers, or steam, collisions, strikes, arrest, or restraint of princes, courts of law, rulers, or people, or from any act, neglect, or default of the shipowner's servants, whether on board the steamer or not, or on board any other vessel belonging to the shipowner, either in matters aforesaid or otherwise howsoever. Neither the shipowner nor the agent is under any circumstances, or for any cause whatever or however arising, liable to an amount exceeding 250 francs for death, injury, or delay of or to any passenger carried under this ticket. The shipowner will use all reasonable means to send the steamer to sea in a seaworthy state and well-found, but does not warrant her seaworthiness.

“(d) The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket, beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of 1 per cent, or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading, in use from the port of departure.”

It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of the *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 507,

and *Knott v. Botany Worsted Mills*, 179 U. S. 69, 71; where the previously adjudged cases are referred to, and the principles by them expounded are restated.

True it is that by the act of February 13, 1893 (27 Stat. at L. 445, chap. 105), known as the Harter Act, already adverted to, the general rule just above stated was modified so as to exempt vessels, when engaged in the classes of carriage coming within the terms of the statute, from liability for negligence in certain particulars. But while this statute changed the general rule in cases which the act embraced, it left such rule in all other cases unimpaired. Indeed, in view of the well-settled nature of the general rule at the time the statute was adopted, it must result that legislative approval was by clear implication given to the general rule as then existing in all cases where it was not changed.

Testing the exemptions found in the ticket by the rule of public policy, it is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or his servants. And seeking to accomplish these results, it is equally plain that the conditions were void if their legality be considered solely with reference to the modifications of the general rule created by the act of 1893. *Knott v. Botany Worsted Mills*, 179 U. S. 69. As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that "all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made," it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. Story, Conf. L. §§ 38, 244. While, as said in *Knott v. Botany Worsted Mills*, the previous decisions of this court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this court. In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, the question arose whether conditions exempting a carrier from responsibility for loss caused by the neglect of himself or his servants could be

enforced in the courts of the United States, the bill of lading having been issued in New York by a British ship for goods consigned to England. Despite the fact that conditions exempting from responsibility for loss arising from negligence were valid by the laws of New York, and would have been upheld in the courts of that State, it was decided that, in view of the rule of public policy applied by the courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the States of the Union. Nor is the suggestion that because there is no statute expressly prohibiting such contracts, and because it is assumed no offence against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion. The precise question has been carefully considered and decided in the district courts of the United States. In *The Guildhall*, 58 Fed. 796, it was held that a stipulation in a bill of lading issued at Rotterdam on goods destined to New York, exempting the carrier from liability for negligence, would not be enforced in the courts of the United States, although such a condition was valid under the law of Holland. In *The Glenmavis*, 69 Fed. 472, the same rule was applied to a bill of lading issued in Germany by a British ship, for goods consigned to Philadelphia. Indeed, by implication the question is controlled by statute. We have previously pointed out, under the assumption that the Harter Act does not apply to the carriage of the baggage of a passenger, that such law in effect affirms the rule of public policy as previously existing in the cases, where no change was made. But that act expressly prohibits carriers engaged in the business which it regulates from contracting, even in a foreign country, for a shipment to the United States, to relieve themselves from negligence in cases where the statute does not do so. *Knott v. Botany Worsted Mills*, 179 U. S. 69. The theory, then, by which alone the conditions relied on in this case can be enforced, despite the public policy which governs, in the courts of the United States, reduces itself to this: Carriers who transact a class of business where they are exempt by law, in many cases, from the consequences of the neglect of themselves or their servants, may not overthrow public policy by contracts made in a foreign country for a shipment to the United States; but carriers who are in no case exempt by the law from the consequence of their neglect may do so. But this amounts in last analysis to this: The lesser the immunity from negligence the greater the power to avoid the consequences of negligence.

The general exemptions from responsibility for negligence which the ticket embodies being controlled by the rule enforced in the courts of

the United States, and being therefore void, because against public policy, we come to consider the particular provisions contained in the ticket with reference to the value of the baggage and the limit of recovery, if any, arising therefrom. . . .

In view of the nature and duration of the voyage, of the circumstances which may be reasonably deemed to environ transatlantic cabin passengers, and the objects and purposes which it may also be justly assumed the persons who undertake such a voyage have in view, we think the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment, was void. It is therefore unnecessary to decide whether the ticket delivered and received under circumstances disclosed by the record gave rise to a contract embracing the exceptions to the carrier's liability which were stated on the ticket. We intimate no opinion on the subject.

The decree below must be reversed, and the cause remanded to the District Court, with directions to ascertain the actual damage sustained by the libellants, and to enter a decree in their favor for the amount of such damages, with interest and costs.

And it is so ordered.

EMERY v. BURBANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1895.

[Reported 163 Massachusetts, 326.]

HOLMES, J. This is an action on an oral agreement, alleged to have been made in Maine, in 1890, by the defendant's testatrix, Mrs. Rumery, to the effect that, if the plaintiff would leave Maine and take care of Mrs. Rumery, the latter would leave the plaintiff all her property at her death, and also would put four thousand dollars into a house which the plaintiff should have. At the trial evidence was introduced tending to prove the agreement as alleged. The presiding justice ruled that the action could not be maintained, and the case is here on exceptions. As we are of opinion that the ruling must be sustained under St. 1888, c. 372, requiring agreements to make wills to be in writing, a fuller statement of the facts is not needful.

There is no doubt of the general principles to be applied. A contract valid where it is made is valid everywhere, but it is not necessarily enforceable everywhere. It may be contrary to the policy of the law of the forum. *Van Reimsdyk v. Kane*, 1 Gall. 371, 375; *Greenwood v. Curtis*, 6 Mass. 358; *Fant v. Miller*, 17 Grat. 47, 62. Or again, if the law of the forum requires a certain mode of proof, the contract, although valid, cannot be enforced in that jurisdiction without the proof required there. This is as true between the States of this

Union as it is between Massachusetts and England. *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 306; *Pritchard v. Norton*, 106 U. S. 124, 134; *Downer v. Chesebrough*, 36 Conn. 39; *Kleeman v. Collins*, 9 Bush (Ky.), 460; *Fant v. Miller*, 17 Grat. 47; *Hunt v. Jones*, 12 R. I. 262, 266; *Yates v. Thomson*, 3 Cl. & Fin. 544, 586, 587; *Bain v. Whitehaven & Furness Junction Railway*, 3 H. L. Cas. 1, 19; *Leroux v. Brown*, 12 C. B. 801. When the law involved is a statute, it is a question of construction whether the law is addressed to the necessary constituent elements, or legality, of the contract on the one hand, or to the evidence by which it shall be proved on the other. In the former case, the law affects contracts made within the jurisdiction, wherever sued, and may affect only them. *Drew v. Smith*, 59 Me. 393. In the latter, it applies to all suits within the jurisdiction, wherever the contracts sued upon were made, and again may have no other effect. It is possible, however, that a statute should affect both validity and remedy by express words, and this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other. For instance, in a well-known English case *Maule, J.* said, "The fourth section of the statute of frauds entirely applies to procedure." And on this ground it was held that an action could not be maintained upon an oral contract made in France. But he went on, "It may be that the words used, operating on contracts made in England, renders them void." *Leroux v. Brown*, 12 C. B. 801, 805, 807. We cite the language, not for its particular application, but as a recognition of the possibility which we assert.

The words of the statute before us seem in the first place, and most plainly, to deal with the validity and form of the contract. "No agreement . . . shall be binding, unless such agreement is in writing." If taken literally, they are not satisfied by a written memorandum of the contract; the contract itself must be made in writing. They are limited, too, to agreements made after the passage of the act, a limitation which perhaps would be more likely to be inserted in a law concerning the form of a contract than in one which only changed a rule of evidence. But we are of opinion that the statute ought not to be limited to its operation on the form of contracts made in this State. The generality of the words alone, "no agreement," is not conclusive. But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practised without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts testators should be sued here upon such contracts without written evidence, wherever they are made.

If we are right in our understanding of the policy established by the legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles. "If oral evidence

were offered which the *lex fori* excluded, such exclusion, being founded on the desire of preventing perjury, might claim to override any contrary rule of the *lex loci contractus*, not only on the ground of its being a question of procedure, but also because of that reservation in favor of any stringent domestic policy which controls all maxims of private international law." Westlake, *Priv. Int. Law* (3d. ed.), § 208; Wharton, *Conf. Laws* (2d. ed.), § 766.

In our view, the statute, whatever it expresses, implies a rule of procedure broad enough to cover this case. It is not necessary to decide exactly how broad the rule may be, — whether, for instance, if, by some unusual chance, a suit should happen to be brought here against an ancillary administrator upon a contract made in another State by one of its inhabitants, the contract would have to be in writing. The rule extends at least to contracts by Massachusetts testators. It might be possible to treat the words, "signed by the party whose executor or administrator is sought to be charged," as meaning "signed by the party whose executor or administrator is sought to be charged in Massachusetts," and to construe the whole statute as directed only to procedure. Compare *Fant v. Miller*, 17 Grat. 47, 72 *et seq.*; *Denny v. Williams*, 5 Allen, 1, 3, 9. Upon this question also we express no opinion. All that we decide is that the statute does apply to a case like the present.

The law of the testator's domicile is the law of the will. A contract to make a will means an effectual will, and therefore a will good by the law of the domicile. In a sense, the place of performance, as well as the forum for a suit in case of breach, is the domicile. We do not draw the conclusion that therefore the validity of all such contracts, wherever sued on, must depend on the law of the domicile. That would leave many such contracts in a state of indeterminate validity, until the testator's death, as he may change his domicile so long as he can travel. But the consideration shows that the final domicile is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly. There would be no question to be argued if the law were in terms a rule of evidence. It is equally open for a State to declare, upon the same considerations which dictate a rule of evidence, that a contract must have certain form if it is to be enforced against its inhabitants in its courts. Legislation of this kind for contracts which thus necessarily reach into the jurisdiction in their operation hardly goes as far as statutes dealing with substantive liability which have been upheld. *Commonwealth v. Macloon*, 101 Mass. 1.

If the statute applies, the fact that the plaintiff has furnished the stipulated consideration will not prevent its application.

Exceptions overruled.

ARMSTRONG v. BEST.

SUPREME COURT OF NORTH CAROLINA. 1893.

[Reported 112 North Carolina, 59.]

CIVIL ACTION, heard before BRYAN, J., at January Term, 1892, of Wayne Superior Court, upon the following agreed statement of facts :

"It is agreed that at the time the goods for the purchase-money of which this action is brought were bought the plaintiffs were merchants, doing business in the city of Baltimore, in the State of Maryland, and the defendant L. C. Best was carrying on the trade of milliner and merchant in the city of Goldsboro, State of North Carolina, in her own name, as a licensed trader; that said goods were ordered by the defendant L. C. Best of the plaintiffs, and they were shipped by the plaintiffs to her from their place of business in the city of Baltimore, and were to be paid for by defendant L. C. Best at the end of sixty days; that at that time, and since, the defendant was and is a citizen and resident of the State of North Carolina, and a married woman, living with her husband, the defendant N. W. Best. The goods have not been paid for, except the credits set out in the accounts filed, and those not paid for were worth the agreed price of \$212.43; that the defendant has never been a free-trader under the statutes of North Carolina, and her husband has never consented in writing to the orders of said goods and to the sale thereof."

Judgment was rendered for defendants, and plaintiffs appealed.

SHEPHERD, C. J. If the contract, which is the subject of this action, was made in this State, it is well settled that it would be void by reason of the common law disability of the *feme* defendant to make any contract whatever upon which a personal judgment can be rendered against her, except in the cases provided by statute. *Pippen v. Wesson*, 74 N. C. 437; *Dougherty v. Sprinkle*, 88 N. C. 300; *Baker v. Garrison*, 108 N. C. 218; *Flaum v. Wallace*, 103 N. C. 296; *Farthing v. Shields*, 106 N. C. 289.

The plaintiffs, however, insist that the contract was made in the city of Baltimore, Maryland, their place of business, where they accepted the proposal of the defendant by shipping the goods according to her order. In this they are correct, for if a contract is completed in another State "it makes no difference in principle whether the citizen of this State goes in person or sends an agent or writes a letter across the boundary line between the two States." *Milliken v. Pratt*, 125 Mass. 374. As was said by Lord Lyndhurst: "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison v. Mills*, 1 Dow. & Cl. 342. So if one in New York orders goods from Boston, "either by a carrier whom he points out or in the usual course of trade, this would be a completion, a making of the contract, and it

would be a Boston contract whether he gave no note or a note payable in Boston, or one without express place of payment." 2 Parsons' Con. 586.

The contract, then, being a Maryland contract, it is next insisted that it is one which a *feme covert* could have made in that State, and therefore enforceable in the courts of North Carolina. We are by no means certain that the present contract is a valid one according to the laws of Maryland, as the statute of that State seems to recognize the legal capacity of a married woman only to the extent of contracting with reference to property acquired by her "skill, industry, or personal labor." Assuming, however, that it is a valid contract in Maryland, we will proceed to the examination of the question whether it should be enforced by the courts of this State.

It is well settled that the law of one State has *proprio vigore* no force or authority beyond the jurisdiction of its own courts, and that whatever effect is given to it by the courts of foreign countries or other States is the result of that international comity (more properly called private international law) which is the product of modern civilization. *Hornthall v. Burwell*, 109 N. C. 10. It is left to each State or nation to say how far it will recognize this comity and to what extent it will be permitted to control its own laws. It has, however, been very generally settled that all matters bearing upon the execution, the interpretation, and the validity of a contract are to be determined by the law of the place where the contract is made, and if valid there it is valid everywhere. *Taylor v. Sharp*, 108 N. C. 377. An exception is maintained by some of the continental jurists as to the capacity of a contracting party, and they generally hold that the incapacity of the domicil attaches to and follows the person wherever he may go. We remarked in *Taylor v. Sharp*, *supra*, that this was not considered by Mr. Justice Story (*Conflict Laws*, 103, 104) as the doctrine of the common law, and we also stated the conclusion of Gray, C. J., in *Milliken v. Pratt*, *supra*, that the general current of the English and American authorities is in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not under the law of the domicil be deemed capable of making it. The proposition, though denied by Dr. Wharton as to infants and *femes covert* (*Conflict of Laws*, 112, 118), seems to be generally accepted in this country in so far as it relates to the enforcement of contracts in courts other than those of the domicil. If, for example, the plaintiffs were suing upon the present contract in the courts of Maryland, the defendant could not, it is thought, avail herself of the incapacity of her domicil, but the *lex loci contractus* would prevail. But quite a different question is presented when the action is brought in the forum of the domicil. In such a case a very important qualification of private international law is to be considered, and this is that no State or nation will enforce a foreign law which is contrary to its fixed and settled policy. In *Bank*

of *Augusta v. Earle*, 13 Pet. 519, Chief Justice Taney, speaking for the court, said: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests." To the same effect is the language of Story, that no State will enforce a foreign law if it be "repugnant to its policy or prejudicial to its interests." Conflict of Laws, 37. That this qualifying principle is applicable to cases like the present is manifest, not only by reason and necessity, but also by the decisions of other courts. Even in *Milliken v. Pratt*, *supra*, in which the *lex loci contractus* is pushed to the extreme limit, it is suggested that where the incapacity of a married woman is the settled policy of the State "for the protection of its own citizens, it could not be held by the courts of that State to yield to the law of another State in which she might undertake to contract."

In *Robertson v. Queen*, 87 Tenn. 445, the contract was made by the *feme* defendant in Kentucky, where she resided and under whose laws she was capable of contracting. An action was brought in Tennessee, and the court held, as we did in the similar cases of *Sharp v. Taylor*, *supra*, and *Wood v. Wheeler*, 111 N. C. 231, that the plaintiff was entitled to recover. The court, however, said: "If this were a suit against a married woman, a citizen of this State, on a contract made out of the State, there would be much force in the insistence of the defendant."

In *Johnson v. Gawtry*, 11 Mo. App. 322, it was held that where a married woman, having a separate estate in land in Missouri, makes a contract in another State, her capacity to make the contract and its validity are to be determined by the law of Missouri, in a suit in a Missouri court to enforce such contract.

In *Bank v. Williams*, 46 Miss. 618, the contract was made in Louisiana, where it would have been valid against the *feme* defendant. The suit was brought in Mississippi, the place of her domicil, and under whose laws the contract was void by reason of her coverture. The opinion of the court is very elaborate, and, although the special character of the Louisiana law is referred to, it is believed that its reasoning is of general application. The court said: "It is the prerogative of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country where the person may be temporarily, will be recognized as valid or not in the forum of his domicil, as they may infringe or not its interests, laws, and policies." After speaking of the separate estate of the wife and the statutes prescribing how it may be charged, the court, referring to the foreign plaintiff, says: "But he must satisfy the court that his debt was such a charge upon her estate, or its income, as she had the power to make; otherwise, it would be a violation of the tenure, the conditions of her title, to allow

him to subject it. But the creditor may say, 'I cannot bring this debt within the terms defined by your law; nevertheless, it was such a contract as a married woman could make by the law of Louisiana. Comity requires your courts to treat the contract precisely as Louisiana would, and I demand a judgment against the wife.' 'No,' says the court, 'you cannot get here any fruit of a judgment; there is nothing subject to its payment, and our law affords no remedy against a married woman in any of its courts, law or equity, except through a property which she has, and which must be pointed out by the creditor. We know of no such thing as a personal obligation, aside from and independent of a property which may discharge it.'"

In North Carolina it has been conclusively determined that the common law disability of a *feme covert* still obtains, and that, except in the cases provided by statute, her promise, as was said by Ruffin, J., is "as void as it ever was, with no power in any court to proceed to judgment against her *in personam*." *Dougherty v. Sprinkle, supra*. The Constitution and laws made in pursuance thereof protect her separate estate and prescribe the manner in which she may dispose of or charge it, and the assent of the husband is generally necessary.

This brief reference to our laws in respect to married women is sufficient to show that the enforcement of the present contract is wholly repugnant to our domestic policy, as well as prejudicial to the interests of our citizens. It is not pretended that the defendant has attempted to charge her separate estate in any manner provided by our laws, and to hold that she may subject it to execution upon a personal judgment, by reason of a promise made during a short visit to another State, or, as in this case, by a simple order for goods, would afford an easy method of charging her property in contravention of the public policy and laws of the domicile. It is further to be observed that in North Carolina, as a general rule, the written assent of the husband is necessary in order to give any effect whatever to her obligations, yet this wholesome provision may easily be evaded, even in the very presence of the husband and despite his protest, by a simple correspondence by the wife with parties in another State, which may technically amount to a foreign contract. In this way she could indirectly dispose of or charge all of her real or personal property, entirely freed from the restraint of her husband, or the methods prescribed by the *lex rei situs*. We cannot assent to the proposition that a foreign law, thus introduced and so utterly subversive of the laws regulating a large amount of property within the limits of this State, will be recognized and enforced by our courts.

The courts of our State have perfect jurisdiction over all personal and real property within its limits belonging to the wife, and if our laws in respect to the manner in which it may be charged conflict with those of another State, it cannot be made a question in our own courts as to which shall prevail. It is certainly competent for any State to adopt laws to protect its own property as well as to regulate it, and

“no nation,” says Story, “will suffer the laws of another to interfere with her own to the injury of her citizens. That whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions. . . . That whenever a doubt does exist, the court which decides will prefer the laws of its own country to that of the stranger.” Conflict of Laws, 28.

For the reasons given, we cannot recognize the present contract as an enforceable one in our courts.

We think his Honor was correct in his ruling that the plaintiffs were not entitled to recover.

*Affirmed.*¹

POLSON v. STEWART.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1897.

[Reported 167 Massachusetts, 211.]

HOLMES, J. This is a bill to enforce a covenant made by the defendant to his wife, the plaintiff's intestate, in North Carolina, to surrender all his marital rights in certain land of hers. The land is in Massachusetts. The parties to the covenant were domiciled in North Carolina. According to the bill, the wife took steps which under the North Carolina statutes gave her the right to contract as a *feme sole* with her husband as well as with others, and afterwards released her dower in the defendant's lands. In consideration of this release, and to induce his wife to forbear suing for divorce, for which she had just cause, and for other adequate considerations, the defendant executed the covenant. The defendant demurs.

The argument in support of the demurrer goes a little further than is open on the allegations of the bill. It suggests that the instrument which made the wife a “free trader,” in the language of the statute, did not go into effect until after the execution of the release of dower and of the defendant's covenant. But the allegation is that the last mentioned two deeds were executed after the wife became a free trader, as they probably were in fact, notwithstanding their bearing date earlier than the registration of the free trader instrument. We must assume that at the date of their dealings together the defendant and his wife had as large a freedom to contract together as the laws of their domicile could give them.

But it is said that the laws of the parties' domicile could not authorize a contract between them as to lands in Massachusetts. Obviously this is not true. It is true that the laws of other States cannot render valid conveyances of property within our borders which our laws say

¹ *Acc.* Thompson v. Taylor, 65 N. J. L. 107, 46 Atl. 567. — Ed.

are void, for the plain reason that we have exclusive power over the *res*. *Ross v. Ross*, 129 Mass. 243, 246; *Hallgarten v. Oldham*, 135 Mass. 1, 7, 8. But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract. Such precedents as there are, are on the same side. The most important intimations to the contrary which we have seen are a brief note in Story, *Conf. of Laws*, § 436, note, and the doubts expressed in Mr. Dicey's very able and valuable book. Lord Cottenham stated and enforced the rule in the clearest way in *Ex parte Pollard*, 4 Deac. 27, 40 *et seq.*; s. c. Mont. & Ch. 239, 250. So Lord Romilly in *Cood v. Cood*, 33 Beav. 314, 322. So in Scotland, in a case like the present, where the contract enforced was the wife's. *Findlater v. Seafeld*, Faculty Decisions, 553, Feb. 8, 1814. See also *Cuninghame v. Semple*, 11 Morison, 4462; *Erskine*, Inst. Bk. 3, tit. 2, § 40; *Westlake*, Priv. Int. Law (3d ed.), § 172; *Rorer*, Interstate Law (2d ed.), 289, 290.

If valid by the law of North Carolina there is no reason why the contract should not be enforced here. The general principle is familiar. Without considering the argument addressed to us that such a contract would have been good in equity if made here (*Holmes v. Winchester*, 133 Mass. 140; *Jones v. Clifton*, 101 U. S. 225; and *Bean v. Patterson*, 122 U. S. 496, 499), we see no ground of policy for an exception. The statutory limits which have been found to the power of a wife to release dower (*Mason v. Mason*, 140 Mass. 63, and *Peaslee v. Peaslee*, 147 Mass. 171, 181) do not prevent a husband from making a valid covenant that he will not claim marital rights with any person competent to receive a covenant from him. *Charles v. Charles*, 8 Grat. 486; *Logan v. Birkett*, 1 Myl. & K. 220; *Marshall v. Beall*, 6 How. 70. The competency of the wife to receive the covenant is established by the law of her domicile and of the place of the contract. The laws of Massachusetts do not make it impossible for him specifically to perform his undertaking. He can give a release which will be good by Massachusetts law. If it be said that the rights of the administrator are only derivative from the wife, we agree, and we do not for a moment regard any one as privy to the contract except as representing the wife. But if then it be asked whether she could have enforced the contract during her life, an answer in the affirmative is made easy by considering exactly what the defendant undertook to do. So far as occurs to us, he undertook three things: first, not to disturb his wife's enjoyment while she kept her property; secondly, to execute whatever instrument was necessary in order to release his rights if she conveyed; and thirdly, to claim no

rights on her death, but to do whatever was necessary to clear the title from such rights then. All these things were as capable of performance in Massachusetts as they would have been in North Carolina. Indeed, all the purposes of the covenant could have been secured at once in the lifetime of the wife by a joint conveyance of the property to a trustee upon trusts properly limited. It will be seen that the case does not raise the question as to what the common law and the presumed law of North Carolina would be as to a North Carolina contract calling for acts in Massachusetts, or concerning property in Massachusetts, which could not be done consistently with Massachusetts law.

With regard to the construction of the defendant's covenant we have no doubt. It is "to surrender, convey, and transfer to said Kitty T. Polson Stewart, Jr., and her heirs, all the rights of him, the said Henry Stewart, Jr., in and to the lands and property above described, which he may have acquired by reason of the aforesaid marriage, and the said Kitty T. Polson Stewart, Jr., is to have the full and absolute control and possession of all of said property free and discharged of all the rights, claims, or demands of every nature whatsoever of the said Henry Stewart, Jr." Notwithstanding the decision of the majority in *Rochon v. Lecatt*, 2 Stew. (Ala.) 429, we think that it would be quibbling with the manifest intent to put an end to all claims of the defendant if we were to distinguish between vested rights which had and those which had not yet become estates in the land, or between claims during the life of the wife and claims after her death. It is plain, too, that the words import a covenant for such further assurance as may be necessary to carry out the manifest object of the deed. See *Marshall v. Beall*, 6 How. 70; *Ward v. Thompson*, 6 Gill & Johns. 349; *Hutchins v. Dixon*, 11 Md. 29; *Hamrico v. Laird*, 10 Yerger, 222; *Mason v. Deese*, 30 Ga. 308; *McLeod v. Board*, 30 Tex. 238.

Objections are urged against the consideration. The instrument is alleged to have been a covenant. It is set forth, and mentions one dollar as the consideration. But the bill alleges others, to which we have referred. It is argued that one of them, forbearance to bring a well-founded suit for divorce, was illegal. The judgment of the majority in *Merrill v. Peaslee*, 146 Mass. 460, 463, expressly guarded itself against sanctioning such a notion, and decisions of the greatest weight referred to in that case show that such a consideration is both sufficient and legal. *Newsome v. Newsome*, L. R. 2 P. & D. 306, 312; *Wilson v. Wilson*, 1 H. L. Cas. 538, 574; *Besant v. Wood*, 12 Ch. D. 605, 622; *Hart v. Hart*, 18 Ch. D. 670, 685; *Adams v. Adams*, 91 N. Y. 381; *Sterling v. Sterling*, 12 Ga. 201. Then it is said that the wife's agreement in bar of her dower was invalid, because it had not the certificate that she had been examined, etc., as required by the North Carolina statutes annexed to the bill. Whether it was invalid or not, the defendant was content with it, and accepted the

execution of it as a consideration. This being so, it would be hard to say that it was not one, even if without legal effect. Whether void or not, it is alleged to have been performed; and finally, if it was void, it was void on its face, as matter of law, and the husband must be taken to have known it, so that the most that could be done would be to disregard it; if that were done, the other considerations would be sufficient. See *Jones v. Waite*, 5 Bing. N. C. 341, 351.

Demurrer overruled.

FIELD, C. J. I cannot assent to the opinion of a majority of the court. By our law husband and wife are under a general disability or incapacity to make contracts with each other. The decision in *Whitney v. Closson*, 138 Mass. 49, shows, I think, that the contract sued on would not be enforced if the husband and wife had been domiciled in Massachusetts when it was made. As a conveyance made directly between husband and wife of an interest in Massachusetts land would be void although the parties were domiciled in North Carolina when it was made, and by the laws of North Carolina were authorized to make such a conveyance, so I think that a contract for such a conveyance between the same persons also would be void. It seems to me illogical to say that we will not permit a conveyance of Massachusetts land directly between husband and wife, wherever they may have their domicile, and yet say that they may make a contract to convey such land from one to the other which our courts will specifically enforce. It is possible to abandon the rule of *lex rei sitæ*, but to keep it for conveyances of land and to abandon it for contracts to convey land seems to me unwarrantable.

The question of the validity of a mortgage of land in this Commonwealth is to be decided by the law here, although the mortgage was executed elsewhere where the parties resided, and would have been void if upon land there situated. *Goddard v. Sawyer*, 9 Allen, 78. "It is a settled principle, that 'the title to, and the disposition of, real estate must be exclusively regulated by the law of the place in which it is situated.'" *Cutter v. Davenport*, 1 Pick. 81; *Osborn v. Adams*, 18 Pick. 245. The testamentary execution of a power of appointment given by will in relation to land is governed by the *lex situs*, or the law of the domicile of the donor of the power. *Sewall v. Wilmer*, 132 Mass. 131.

The plaintiff, merely as administrator, cannot maintain the bill. *Caverly v. Simpson*, 132 Mass. 462, 464. The plaintiff must proceed on the ground that Mrs. Henry Stewart, Jr., acquired by the instruments executed in North Carolina the right to have conveyed or released to her and her heirs by her husband all the interest he had as her husband in her lands in Massachusetts; that this right descended on her death to her heirs, according to the law of Massachusetts; and that the plaintiff, being an heir, has acquired the interest of the other heirs, and therefore brings the bill as owner of

this right. The plaintiff, as heir, claims by descent from Mrs. Stewart, and if the contract sued on is void as to her, it is void as to him.

It is only on the ground that the contract conveyed an equitable title that the plaintiff as heir has any standing in court. His counsel founds his argument on the distinction between a conveyance of the legal title to land and a contract to convey it. If the instrument relied on purported to convey the legal title, his counsel in effect admits that it would be void by our law. He accepts the doctrine stated in *Ross v. Ross*, 129 Mass. 243, 246, as follows: "And the validity of any transfer of real estate by act of the owner, whether *inter vivos* or by will, is to be determined, even as regards the capacity of the grantor or testator, by the law of the State in which the land is situated." As a contract purporting to convey a right in equity to obtain the legal title to land, he contends that it is valid. I do not dispute the cases cited with reference to contracts concerning personal property, but the rule at common law in regard to the capacity of parties to make contracts concerning real property, as I read the cases and text-books, is that the *lex situs* governs. *Cochran v. Benton*, 126 Ind. 58; *Doyle v. McGuire*, 38 Ia. 410; *Sell v. Miller*, 11 Ohio St. 331; *Johnston v. Gawtry*, 11 Mo. App. 322; *Frierson v. Williams*, 57 Miss. 451.

Dicey on the Conflict of Laws is the latest text-book on the subject. He states the rule as follows:—

Page lxxxix. "(B). Validity of Contract. (i) Capacity.

"Rule 146. Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract.

"(1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid.

"(2) If he has not such capacity by that law, the contract is invalid.

"Exception 1. A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loci contractus*) [?].

"Exception 2. A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs*."

Page xcii. "(A). Contracts with regard to Immovables.

"Rule 151. The effect of a contract with regard to an immovable is governed by the proper law of the contract [?].

"The proper law of such contract is, in general, the law of the country where the immovable is situate (*lex situs*)."

On page 517 *et seq.* he states the law in the same way, with numerous illustrations, but with some hesitation as to the law governing the form of contracts to convey immovables. See page xc., Rule 147, Exception 1. For American notes with cases, see page 527 *et seq.* In the Appendix, page 769, note (B), he discusses the subject at length, and with the same result. Some of the cases cited are the

following: Succession of Larendon, 39 La. An. 952; Besse v. Pellochoux, 73 Ill. 285; Fuss v. Fuss, 24 Wis. 256; Moore v. Church, 70 Ia. 208; Heine v. Mechanics & Traders Ins. Co. 45 La. An. 770; First National Bank of Attleboro v. Hughes, 10 Mo. App. 7; Ordonaux v. Rey, 2 Sandf. Ch. 33; Adams v. Clutterbuck, 10 Q. B. D. 403; Chapman v. Robertson, 6 Paige, 627, 630.

Phillimore in 4 Int. Law (3d ed.), 596, states the law as follows: —

“DCCXXXV. 1. The case of a contract respecting the *transfer* of immovable property illustrates the variety of the rules which the foreign writers upon private international law consider applicable to a contract to which a foreigner is a party: they say that,

“i. The capacity of the obligor to enter into the contract is determined by reference to the law of his domicile.

“ii. The like capacity of the obligee by the law of *his* domicile.

“iii. The mode of alienation or acquisition of the immovable property is to be governed by the law of the situation of that property.

“iv. The external form of the contract is to be governed by the law of the place in which the contract is made.

“It is even suggested by Fœlix, that sometimes the *interpretation* of the contract may require the application of a fifth law.

“DCCXXXVI. The Law of England, and the Law of the North American United States, require the application of the *lex rei sitæ* to all the four predicaments mentioned in the last section.

“DCCXXXVII. But a distinction is to be taken between contracts to transfer property and the contracts by which it is transferred. The former are valid if executed according to the *lex loci contractus*; the latter require for their validity a compliance with the forms prescribed by the *lex rei sitæ*. Without this compliance the *dominium* in the property will not pass.”

To the same effect as to the capacity of the parties are Rattigan, Priv. Int. Law, 128; Whart. Confl. of Laws (2d ed.), § 296; Story, Confl. of Laws (8th ed.), §§ 424–431, 435; Rorer, Interstate Law, 263; Nelson, Priv. Int. Law, 147, 260. See Westlake, Priv. Int. Law (3d ed.), §§ 156, 167 *et seq.*

On reason and authority I think it cannot be held that, although a deed between a husband and his wife, domiciled in North Carolina, of the rights of each in the lands of the other in Massachusetts, is void as a conveyance by reason of the incapacity of the parties under the law of Massachusetts to make and receive such a conveyance to and from each other, yet, if there are covenants in the deed to make a good title, the covenants can be specifically enforced by our courts, and a conveyance compelled, which, if voluntarily made between the parties, would be void.

I doubt if all of the instruments relied on have been executed in accordance with the statutes of North Carolina. By section 1823 of the statutes of that State set out in the papers, the wife became a free trader from the time of registration. This I understand is January

7, 1893. Exhibit B purports to have been executed before that time, to wit, January 4, 1893. There does not appear to have been any examination of the wife separate and apart from her husband, as required by section 1835. If Exhibit B fails, there is at least a partial failure of consideration for Exhibit C. It is said that an additional consideration is alleged, viz. the wife's forbearing to bring a suit for divorce. Whether this last is a sufficient consideration for a contract I do not consider. It is plain enough that there was an attempt on the part of the husband and wife to continue to live separate and apart from each other without divorce, and to release to each other all the property rights each had in the property of the other. If the release of one fails, I think that this court should not specifically enforce the release of the other; mutuality in this respect is of the essence of the transaction. If the husband owned lands in Massachusetts, and had died before his wife, I do not think that Exhibit B, even if it were executed according to the statutes of North Carolina, and the wife duly examined and a certificate thereof duly made, would bar her of her dower. Our statutes provide how dower may be barred. Pub. Sts. c. 124, §§ 6-9. Exhibit B is not within the statute. See *Mason v. Mason*, 140 Mass. 63. Antenuptial contracts have been enforced here in equity so as to operate as a bar of dower, even if they did not constitute a legal bar. *Jenkins v. Holt*, 109 Mass. 261. But postnuptial contracts, so far as I am aware, never have been enforced here so as to bar dower, unless they conform to the statutes. *Whitney v. Closson*, 138 Mass. 49. Whatever may be true of contracts between husband and wife made in or when they are domiciled in other jurisdictions, so far as personal property or personal liability is concerned, I think that contracts affecting the title to real property situate within the Commonwealth should be such as are authorized by our laws. I am of opinion that the bill should be dismissed.

DELAUNAY v. THE LONDON AND PROVINCIAL MARINE
INSURANCE CO.

TRIBUNAL OF COMMERCE OF THE SEINE. 1897.

[*Reported 26 Clunet*, 340.]

THE TRIBUNAL. Delaunay sues the London and Provincial Marine Insurance Company for the sum of 12,625 francs, the amount of the risk covered by the defendant on the ship "Ocean," which was burned at sea on a voyage from Dakar to Réunion. The plaintiff alleges that this insurance was written at London, upon his order and account, by Mautin, a sworn marine insurance broker at Paris, and that the policy contains the following clause: "It is declared and agreed by these

presents that in case of loss the policy hereto annexed, No. 566,827, dated December 28, 1895, shall be considered as sufficient proof of full and entire interest."

Delaunay claims and pleads that it is here immaterial that there is no insurable interest in France, and that, contrary to the provisions of the French law, it names the broker as dealing for himself, his representatives, and all persons in interest. The policy was written in England in conformity with English rules and usages with respect to marine insurance, for an object permitted by the English law; and the insurer therefore should not invoke the French law in order to refuse to fulfil the obligation contracted by him toward the assured.

It is admitted, however, that Delaunay is neither owner of the vessel, nor a creditor with a lien upon it in whole or in part, nor owner of any part of the cargo of the ship "Ocean," nor has he any lien upon the freight; but he claims to be a creditor of the owner, having become so before the vessel set sail. Delaunay states in his argument at the bar, that the debt being secured only by the freight (since the vessel was hypothecated) this security was strengthened by contracting on his own account an insurance on the safe arrival, on the supposition that the failure of the vessel to arrive at destination would jeopardize his debt by depriving his debtor of the sums due for freight.

It is here a question of the execution of a contract of marine insurance. The essence of such a contract is to secure the assured against the risks of navigation. The insurer, in consideration of the payment of a premium, engages to indemnify the assured against the loss which he may experience by the destruction of something exposed for a certain term to the fortune of the sea. It is true that a Frenchman who contracts abroad whether as insurer or as insured, submits to the law of that country, and cannot, when sued in France, invoke the French law as the law of his obligation; but this is always subject to the condition that the policy contain nothing contrary to the public policy of France in matters of insurance. This condition determines the question, and it would be premature to examine the other points raised by the parties before deciding whether the principles of public policy as established in France have been respected or violated in the contract submitted to the judgment of the court. There is nothing to prevent a creditor, in exercise of the right conferred on him by article 1166 of the Civil Code, from doing an act to preserve the property of his debtor, but the act must be done in the name of the debtor. In maritime practice, insurance may be taken out by the assured himself or by a third person acting on account of the assured or on account of whom it may concern, which must be expressed in the policy; but in any case public policy forbids insuring anything but maritime risks. In this case Delaunay has not insured in his debtor's name any part whatsoever of his property exposed to maritime risk. The object of his insurance, according to his own statement, was to secure the payment of a debt, a debt absolutely due him in any state of the case, whatever the fate of

the vessel during the voyage. The loss of this vessel, involving the payment of the insurance, did not even result, by virtue of the contract, in transferring to the insurer rights of the assured in the thing insured, any more than in discharging the debtor. Such insurance is contrary to public policy in France.

Consequently, without going into the question whether the contract was regularly made in England and in conformity with her laws by Mautin, acting by order of and on account of Delaunay, it is sufficient to say that the suit brought in this court for this purpose will not lie, and should be dismissed.

SUMMARY OF THE CONFLICT OF LAWS.

I.

RIGHTS.

§ 1. The topic called "Conflict of Laws" deals with the recognition and enforcement of foreign created rights.

§ 2. In the legal sense, all rights must be created by some law. A right is artificial, not a mere natural fact; no legal right exists by nature. A right is a political, not a social thing; no legal right can be created by the mere will of parties.

Law being a general rule to govern future transactions, its method of creating rights is to provide that upon the happening of a certain event a right shall accrue. The law annexes to the event a certain consequence, namely, the creation of a legal right. The creation of a right is therefore conditioned upon the happening of an event.

§ 3. Events which the law acts upon may be of two sorts; acts of human beings, and so-called "acts of God," that is, events in which no human being has a share. Rights generally follow acts of men; though sometimes a right is created as a result solely of an act of God (as lapse of time: accretion).

§ 4. When a right has been created by law, this right itself becomes a fact; and its existence may be a factor in an event which the same or some other law makes the condition of a new right. In other words, a right may be changed by the law that created it, or by any other law having power over it.

§ 5. If no law having power to do so has changed a right, the existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact.

II.

LAW.

§ 6. For the creation of rights, as has been seen, there must exist some law with power to create them: or in the ordinary phrase, with jurisdiction.

§ 7. Wherever, therefore, there is a political society, there must be some complete body of law, which shall cover every event there happening (GROSSCUP, J., in *Swift v. R. R.*, i. 117).

This single law is the "law of the land," a law which belongs to a certain political division of territory. The law prevails throughout this territory; and conversely, it cannot prevail as law outside it (WARE, J., in *Polydore v. Prince*, iii. 5; *Story*, ii. 1).

In the case of wandering people without settled territory the law is the law of the people, not of the land: tribal law. Such is the law of tribal American Indians (*Wall v. Williamson*, ii. 77; see *Roche v. Washington*, ii. 81). Such were the laws of the barbarians in the early Middle Ages; and such an idea of law still colors the modern Civil Law of Europe (see A. Pillet, in ii. 3 ff.). The Common Law has always been territorial.

It follows that there can be no general law on the high seas (*Norman v. Norman*, ii. 44).

§ 8. Since political society existed for the first time, law has been continuous. In each new establishment of a society the settlers carried law with them. If the members of the new society had been used to a single system of law, that would be continued. If they had been subject to different systems of law, the new law would be some natural resultant of these (*Bank v. Kinner*, i. 76; *McKennon v. Winn*, i. 83).

§ 9. Law once established continues until changed by some competent legislative power. It is not changed merely by change of sovereignty (*C. v. Chapman*, i. 72), or by conquest (*Lord Mansfield*, in *Campbell v. Hall*, i. 56; *Blankard v. Galdy*, i. 65), or by the establishment of a new constitution (*Shiras, J.*, in *Murray v. Ry.*, i. 100, 101, 107, 110, 112).

§ 10. If a conquest is followed by a resettlement and complete change of customs, the law will be changed; as in New York after the English conquest (*Mortimer v. R. R.*, i. 80). So if territory containing a small body of people, not constituting a separate social community, is annexed to another country, the law of the latter country at once takes effect, since the new territory and inhabitants are by the annexation itself incorporated with the old (*Chappell v. Jardine*, i. 77); but if the annexed territory contained a separate political society, their old laws would continue, as in the case of the annexation of Florida.

Where an uninhabited portion of territory is set off from a country, it would seem that the law of that country would cease to be in effect; leaving the land free for the introduction of law by settlement or by annexation to another country (*McKennon v. Winn*, i. 83).

§ 11. Not only must every political society have some law, but it must have only one law. If two laws prevailed at the same time, they might be mutually destructive. It is impossible that a single event should be followed by two contradictory consequences. Only

one law, therefore, can have jurisdiction (*SHIRAS, J., in Murray v. Ry.*, i. 105).

§ 12. The fact that different portions of the law are altered by distinct legislative powers, does not interfere with the singleness of the law.

We have seen that law came into being originally at the foundation of the society, and has since been changed only by some legislative power (§§ 8, 9). Consequently if two legislative powers now exist, it must be by consent of the prior power; and the changes made by each are changes in the single law.

For example, the Church has obtained legislative power in many countries. This is by consent of the sovereign (*Selim Farag v. Mardrous*, i. 85), and the law after change by the Church is still one, as it has continued to be (*e. g.* in England) after the law-making power of the Church was curtailed, or (*e. g.* in the United States) after it ceased (*Matthews v. Burdett*, i. 85).

In many semi-civilized countries foreign sovereigns are allowed consular jurisdiction, with some power of affecting the law. This is always by consent of the country affected, usually by treaty (*Papayanni v. Nav. Co.*, i. 87), and the law remains the single law of that country. Therefore the constitution of the country exercising the jurisdiction does not apply (*In re Ross*, i. 89; *Fichera v. De Strens*, i. 92).

In each State of the Union the Congress of the United States has been granted by the Constitution the power to change the law in some particulars. The law as thus changed remains, however, the single law of the State. There is no room for a second law to have place. The so-called doctrine of a "federal common-law" can therefore have no meaning, except as explained in the next section; the law of the State continues to be that alone, modified as it may be by Act of Congress. (The difference between *Murray v. Ry.*, i. 97, and *Swift v. R. R.*, i. 116, was so resolved in *W. U. T. Co. v. Call Pub. Co.*, i. 491.)

§ 13. When (as sometimes happens) two courts of equal authority and without a common superior have the duty of declaring the same law, there is no possibility of compelling them to adopt the same view of the law. If they differ, this cannot mean that there are two laws, but merely that one court or both is mistaken in its statement of the law; as also may happen for a time where courts of co-ordinate jurisdiction have a common superior, like the English courts of King's Bench and Exchequer a century ago.

An example of such co-ordinate courts without common superior, is the State and Federal Courts in all cases where federal jurisdiction depends upon diverse citizenship. In such cases the Federal Court is declaring the law of the State, but declines to accept as binding a prior declaration of the law by the State court. (*Swift v. Tyson*, i. 95; *GRAY, J., in Liverpool S. Co. v. Ins. Co.*, ii. 532.)

§ 14. Since there can be but one law in a place (§ 11), it follows that every question there arising must be determined by the law of that place. A foreign law must there be merely a fact (*Haven v. Foster*, i. 127), not known to those expert in law (*i. e.* the judges) but proved by evidence, like any other fact (*Kline v. Baker*, i. 129; *U. S. v. Perot*, i. 139; *Owings v. Hull*, i. 131).

It follows that the law of each territory which forms a political unit is a thing by itself, and cannot be the same as the law of another territory, though the two may have a common origin. The phrase "the common law" or "the maritime law" is therefore not accurate in the legal sense. There is a common law of each State, which differs from that of every other State, though the basis of all may be the common law of England (*SHAW, C. J.*, in *C. v. Chapman*, i. 72; *Forepaugh v. R. R.*, i. 131; neglect of this obvious truth has led to an indefensible doctrine of the New York court, *St. Nicholas Bk. v. Bk.*, i. 137). In the same way "maritime law" is such, only so far as it forms part of the law of some territory (*GRAY, J.*, in *Liverpool S. Co. v. Ins. Co.*, ii. 533).

§ 15. Whenever a question arises concerning the recognition or enforcement of a right which, it is claimed, accrued in another State (a question of the Conflict of Laws), it must therefore be solved by the law of the State in which the question arises. The principles of the Conflict of Laws, in other words, form part of the common law of each State. (*LINDLEY, M. R.* in *In re Martin*, ii. 290; *A. V. Dicey*, ii. 3; *J. Story*, ii. 2; see *X. v. Y.*, ii. 37.)

It will of course be assumed that all common-law States will decide such questions in the same way, except so far as the law may have been changed by statute (*FREAR, J.*, in *Carter v. Ins. Co.*, ii. 188); but there is no reason for presuming that questions will be decided in the same way in countries in which a different system of law prevails. Only in such portions of each law as may be supposed to have had a common origin—as, for instance, the limits of national jurisdiction, based on International Law,—should the views of courts not administering a common-law system be regarded as in any sense authoritative.

§ 16. Since the principles of the Conflict of Laws form part of the local law of a State, the legislative power of a State may change those principles at will by statute, without violating its duty toward any other State. This fact is sometimes expressed by the statement that it is *comity* only which leads a State to deal in a particular way with foreign-acquired rights.

But since the legislature alone has the right to change the local law, it follows that the courts have no more power to change this portion of the law than any other. So far as the decision of such a question in court is concerned, the word *comity* has no meaning. (*TANER, C. J.*, in *Bank of Augusta v. Earle*, i. 138.) The courts have no right to enforce or not to enforce a portion of the local law, according as

they desire to please or to retaliate upon some other country (MARSHALL, C. J., in *The Nereide*, i. 138; Fuller, C. J., in *Hilton v. Guyot*, iii. 337; see, however, GRAY, J., in *Hilton v. Guyot*, i. 139). Questions of the Conflict of Laws should therefore be resolved by a court in some one way, that is, in accordance with the law of the land.

§ 17. Questions of the Conflict of Laws require for their solution a consideration of three things: 1, whether a right has been created by some law, and by what law; 2, how far the right so created abroad will be given effect; 3, what remedy will be granted for making it effective. It is, however, first essential to examine the principles which determine the extent of national jurisdiction over persons and things.

III.

JURISDICTION.

§ 18. The jurisdiction of a country is primarily over its territory. Within that territory there is complete jurisdiction over every person and thing. (BRADLEY, J., in *Coe v. Errol*, i. 221 *n.*; AGNEW, J., in *McKeen v. Northampton*, i. 222.)

§ 19. The territory of a country consists of the land, and certain portions of water. All lakes and rivers within the land form parts of the territory; also some bays of the adjacent ocean. The country would seem to have the right to occupy as part of its territory all inlets of the sea, which by reason of physical configuration may fairly be said to be intimately connected with the land (*C. v. Manchester*, i. 29; *Direct Cable Co. v. Tel. Co.*, i. 37). As to the border seas, it would seem that they may be occupied as part of the territory, so far as that is possible from the land, as by the working of mines (COCKBURN, C. J., in *R. v. Keyn*, i. 10). It was held in *R. v. Keyn* (i. 1) that England included no part of the ordinary littoral seas below high-water mark; but it seems that this decision was due to a belief that England had never cared to regard the littoral seas as part of the realm (FIELD, C. J., in *C. v. Manchester*, i. 35), and there is no doubt that for many purposes all nations regard the littoral seas for a certain distance from land as within the jurisdiction. In Massachusetts (as now in England) a border of littoral sea is by statute rightly made part of the State (*C. v. Manchester*, i. 29).

§ 20. How far a foreign vessel sailing in the territorial waters of a country may be subject to the jurisdiction of the country is not fully settled. It seems that the littoral seas are not so far part of the territory, that vessels merely sailing along the coast are governed by the law of the land. Whatever may be true of the locality, the passing vessel at least is exempt from the ordinary jurisdiction (*R. v. Keyn*, i. 1). If a foreign merchant vessel seeks a harbor within

a country, on the other hand, it is certainly subject to all commands of the law; it is bound by police provisions, except so far as it may be exempted by treaty (*Wildenhus's Case*, i. 24; *R. v. Anderson*, i. 51). How far it is bound by the ordinary provisions of law is more doubtful. There are conflicting decisions as to the application of the patent laws of the country (*Caldwell v. Van Vlissingen*, i. 253; *Brown v. Duchesne*, i. 256), and of the maritime law of the country (ii. 344 n.). It seems that the laws for taxation (*Hays v. S. S. Co.*, i. 215) and for registration of title (*Mahler v. Schirmer*, ii. 190) do not prevail.

A foreign man-of-war, even when in port, is not subject to the local jurisdiction and law (*Seagrove v. Parks*, i. 41; but see *BEST*, J., in *Forbes v. Cochrane*, i. 45).

§ 21. A colony, or a dependent country, is not part of the territory, and the law of a country does not as such extend to its colony or dependent country. The legislature of the country has, however, legislative power over the law of the colony; having therefore the double function of territorial legislature for its own territory and imperial legislature for the dependent territory (*Craw v. Ramsey*, i. 53; *Campbell v. Hall*, i. 54; *R. v. Vaughan*, i. 65. See *Adv. Gen. v. Dossee*, i. 67).

§ 22. A vessel is to a large extent within the jurisdiction of the country to which it belongs. So long as it remains upon the high seas, and to a certain extent, probably while it is within the territorial waters of another country (§ 19), the law of the country to which it belongs prevails on board (*Forbes v. Cochrane*, i. 41; *McDonald v. Mallory*, i. 46; *R. v. Anderson*, i. 51). This law extends over foreigners on board as well as over subjects of the same country (*R. v. Keyn*, i. 1; *Dobree v. Napier*, i. 61). In this respect vessels have been likened to floating portions of territory of their country (*COCKBURN*, C. J., in *R. v. Keyn*, i. 3; *HOLROYD*, J., in *Forbes v. Cochrane*, i. 44; *BYLES*, J., in *R. v. Anderson*, i. 53); but this is only a figure, upon which no stress can be laid. The vessel is not really part of the territory. The jurisdiction prevails, although the vessel is outside the limits of the territory as expressly defined by statute (*McDonald v. Mallory*, i. 46). The jurisdiction is extra-territorial.

§ 23. Each country has in a certain sense jurisdiction over its citizens or subjects wherever they may be, and may lay commands upon them. Though these commands may take the form of general laws, it seems clear that the effect of them upon subjects abroad is not that of laws in the strict sense, but merely that of the commands of a superior. They cannot compete with the law of the territory in which the subject may be. They do not affect rights; but if the command is disobeyed the subject may be punished for his disobedience (*Dobree v. Napier*, i. 61; *R. v. Lesley*, i. 63).

§ 24. Whenever a country has extra-territorial legislative power

(as over vessels, or to make consular regulations, or to issue commands to its subjects), it would seem that its acts can take effect abroad only after due notice; and, therefore, after the lapse of sufficient time for the change in law to become known (*Rouet v. Schiff*, i. 93).

§ 25. All persons are within the territory who are in actual presence there; all land which is situated there; all corporeal things which are temporarily or permanently placed there. It was once commonly said that personal property had its situs at the domicile of the owner (*mobilia sequuntur personam*); but this fiction may be regarded as entirely abandoned in the case of corporeal property (*Hoyt v. Commrs.*, i. 218).

In the case of incorporeal property, however, various views have been held as to its situs; and for different purposes the situs has been determined in different ways.

1. The situs of a chose in action is with the creditor (the owner), or (less often) at the owner's domicile, on the old principle *mobilia sequuntur personam*. This has been held in cases of taxation (*BRICKELL, C. J.*, in *R. R. v. Nash*, i. 375, and cases cited; see *State Tax on Foreign-Held Bonds*, i. 224) and of garnishment (*R. R. v. Nash*, i. 373).

2. More commonly, the situs of a chose in action is held to be with the debtor. This has been so held in cases of garnishment (*Ry. v. Sturm*, i. 377) and for administration (iii. 134 n.); it is not held for the purpose of taxation (*State Tax on Foreign-Held Bonds*, i. 224).

3. The true view would seem to be that a chose in action not being corporeal has no situs for any purpose (*DAY, J.*, in *Lee v. Abdy*, ii. 463; *PECKHAM, J.*, in *Guillander v. Howell*, iii. 207).

Accepting the last view, a State can usually obtain jurisdiction over a chose in action only by having jurisdiction over all parties to it.

A chose in action may however be evidenced by a document which is of value in itself, and is marketable. In such a case the territory in which the document is found has power over the document, and to that extent over the chose in action. This has been held in case of a certificate of stock (*Stern v. Queen*, iii. 132; iii. 134 n.); a bond (iii. 134 n.); a negotiable instrument (iii. 134 n.; *Amsden v. Danielson*, iii. 140; iii. 142 n.); a policy of insurance (*Merrill v. Ins. Co.*, iii. 143; *Sulz v. Life Assoc.*, iii. 146).

A chose in action may be within the entire control of a State, and therefore within its jurisdiction. Thus a judgment is within the jurisdiction of the State which rendered it (*CASSODAY, J.*, in *Renier v. Hurlbut*, i. 372; *Adams v. Batchelder*, iii. 130); a share in a corporation, of the State of charter (*Masury v. Bk.*, ii. 181).

§ 26. But by the common law a State does not exercise its jurisdiction over everything within its power. Thus, where property is carried into a territory by the act of God, as by a tempest, jurisdic-

tion is not exercised over it till the owner has a chance to remove it (COCKBURN, C. J., in *Cammell v. Sewell*, ii. 155 *n.*; CROMPTON, J., in s. c., ii. 156); and the same rule seems to be followed where property is brought in by a wrongdoer, without the will or procurement of the owner (*Edgerly v. Bush*, iii. 86). And full jurisdiction is not exercised over a vessel temporarily in port (*Hays v. S. S. Co.*, i. 215; *Caldwell v. Van Vlissingen*, i. 253; *Brown v. Duchesne*, i. 256; *Mahler v. Schirmer*, ii. 190), or over railroad cars passing through the territory (*P. P. Car Co. v. Pennsylvania*, i. 230).

When goods in transit are represented by a bill of lading, they are for many purposes regarded as within the jurisdiction of the country in which the bill of lading is situated (*Reyher v. Gautreau*, ii. 193), though the goods are also recognized as within the jurisdiction of the country where they actually are (*Sutherland v. Bank*, i. 361). An attempt to apply this rule in the case of an ordinary certificate of deposit, and to regard the goods on deposit as within the State where the certificate is found, goes too far (*Shakespeare v. S. D. Co.*, iii. 139).

§ 27. While mere temporary presence within a country will subject a person to its power, greater jurisdiction is in some respects exercised over those persons whose connection with the country is more permanent. The person whose relation to a State is that of citizen or subject owes it allegiance, and wherever he may be he must obey the commands addressed to him by the State (§ 23). A less close and permanent but legally more important relation is that of domicile, that is, the relation of one who has established his home in a State. A third intermediate relation, created by the Code Napoleon and prevailing in France, Belgium, and other States which have received that Code, is that of legally authorized domicile; that is, domicile authorized by the government, a sort of partial naturalization, which confers certain civil rights not generally enjoyed by foreigners (*Harral v. Harral*, i. 195; *Dupuy v. Wurtz*, i. 186). This sort of domicile is unknown in common-law States.

The importance of domicile has been lessened in most European countries, which (led by France) have substituted nationality for domicile as source of many rights. This often leads to a confusion of rights where a subject of a State retaining the old doctrine is domiciled in a State following the French principle (*X. v. Y.*, ii. 37; *Cumming v. Cumming*, ii. 40).

§ 28. A domicile is a legal home. Wherever a person has a single actual home in fact, that is his domicile. But though a man has no actual home, he is still referred by the law to a domicile; every one must have a domicile (Lord WESTBURY, in *Bell v. Kennedy*, i. 148; CHITTY, J., in *Re Craignish*, i. 168; LORD, J., in *Borland v. Boston*, i. 200). And though a man, as sometimes happens, has in fact two homes, he can have but one domicile (*Abington v. North Bridgewater*, i. 172; *Gilman v. Gilman*, i. 179). Artificial rules are sometimes

necessary, therefore, for the determination of domicile; but the relation being based on a natural one, the general nature of domicile is that of an actual home.

§ 29. Since a man may live away from home, something more than mere residence in a place is necessary for domicile. For a domicile there must be both presence in a place and intention to make that place a home; the *animus* and the *factum* must be united (*Bell v. Kennedy*, i. 140). The fact is usually easily determined. The intention is also to be treated as a question of fact, determined by the evidence, of which declarations of intention by the man whose domicile is in question form only a part, and are not conclusive (*In re Craignish*, i. 161; *Gilman v. Gilman*, i. 179).

It may be desired to find a domicile in a State, a town, or even in some part of a town. Though a man's actual place of domicile may be clear, it may be difficult to determine the town; as where the town boundary-line runs through the dwelling-house (*Abington v. North Bridgewater*, i. 172). On the other hand, while a man clearly desires to make his home within a State in which he is present, he may have fixed upon no actual spot within the State as his home. How far such a man may legally be domiciled in the State without having a domicile in any particular locality within the State is doubtful (see *In re Craignish*, i. 161; i. 168 *n.*).

Residence in a non-Christian State does not usually prove a man domiciled there, because, as a matter of fact, one would be so unlikely to choose as his home a place the customs of which are utterly different from his own (*In re Tootal's Trusts*, i. 154). Even if he lives in a privileged trading community, under consular jurisdiction, the case is not altered; for this community is within the jurisdiction and law of the State (§ 12), and domicile there is domicile in the State (*Abd-ul-Messih v. Farra*, i. 160 *n.*). An exceptional position was that of the English settlements in India. A resident in such a settlement, it was anomalously held, might acquire a domicile there, which was not an ordinary domicile in India; it was called an Anglo-Indian domicile (*CHITTY, J.*, in *Tootal's Trusts*, i. 157).

§ 30. Every man at his birth has a domicile, known as the domicile of origin; which in the case of a legitimate child is the father's domicile at the time of his birth, and in the case of an illegitimate child is his mother's domicile at that time (*LORD WESTBURY* in *Udny v. Udny*, i. 151; *CHITTY, J.*, in *Re Craignish*, i. 162.)

§ 31. A new domicile may at any time be acquired; this is called domicile of choice. To acquire another domicile, a man must go to the new place and be there with intent to make that place his home. Both the fact and the intention must concur before the new domicile can be established (*Bell v. Kennedy*, i. 140; i. 149 *n.*; *Dupuy v. Wurtz*, i. 186).

The presence at the new domicile must be actual, but it need not be long-continued; momentary presence, joined with the requisite

intention, is enough to create a new domicile (*Williams v. Roxbury*, i. 178). The presence must be personal; a man cannot acquire a new domicile by agent, even by the agency of a member of his family (i. 186 *n.*). It has been held, however, that a man who is abroad may acquire a new domicile by the presence of his wife in the new place, with his consent (*Bangs v. Brewster*, i. 185).

The intention required is the intent to make the new residence one's home. This intention is quite consistent with a desire to retain the rights of the former domicile; the legal rights are the effect, not the cause, of the domicile, and are quite independent of the will of the party (*RAPALLO*, J., in *Dupuy v. Wurtz*, i. 192). Nor is the motive of the change of importance, so long as (from whatever motive) there is the intent to make the new residence a home (*Young v. Pollak*, i. 204).

The idea of home involves some degree of permanence (*Young v. Pollak*, i. 204), and in England the intention required appears to be an intention, so far as one at present feels, always to remain (*Bell v. Kennedy*, i. 140; *In re Craignish*, i. 161). In the United States a less settled intention will suffice; as for instance to stay until one can find a better place (*Wilbraham v. Ludlow*, i. 184) or while one is student in a certain place (*Putnam v. Johnson*, i. 168) provided there is no other home. Residence in a place merely for a temporary purpose, like business, sight-seeing, etc., is not enough (i. 194 *n.*); nor is residence because of illness, even if one has abandoned the hope of returning to the old home (*Dupuy v. Wurtz*, i. 186).

§ 32. A difference of opinion exists as to whether a man may abandon a domicile without acquiring a new one by the concurrence of act and intent. The domicile of origin certainly cannot be abandoned without acquiring a domicile of choice, since that would have the legally impossible result of leaving a man without a domicile (§ 28). But it is held in England that if a domicile of choice is abandoned without acquiring a new domicile of choice, the domicile of origin revives (*Udny v. Udny*, i. 150). In the United States the weight of authority is otherwise (i. 153 *n.*), and it is held that a domicile whether of origin or of choice remains until it is succeeded by a new domicile of choice, and therefore an old domicile remains while one is on his way to an intended new domicile, or while he is in fact without any actual or intended home (*Borland v. Boston*, i. 197).

§ 33. One who is not *sui juris* cannot acquire a domicile of choice for himself; but a domicile of choice may be acquired for him, under all or some circumstances, by one who controls his residence. Thus an infant's domicile may be changed by his father or natural guardian and to some extent by his appointed guardian (*Lamar v. Micou*, i. 207; i. 211 *n.*); an apprentice's by his master (i. 211 *n.*); an insane person's sometimes by his guardian (i. 211 *n.*). A married woman must have her husband's domicile, unless legally separated from him; though for the purpose of obtaining a divorce (and for that purpose

alone, *Shute v. Sargent*, i. 211, to the contrary being an ill-advised opinion) she is allowed a separate domicil in the United States (*Ditson v. Ditson*, i. 205; i. 206 *n.*).

Certain persons who are under physical restraint are regarded as incapable of acquiring a new domicil, since they have no power of choice. Such are prisoners, and paupers in a poor-house (*Young v. Pollak*, i. 204; i. 205 *n.*). Political refugees are not regarded as in the same class (i. 205 *n.*), nor are persons in military service and therefore under orders (*A. G. v. Pottinger*, i. 168; i. 169 *n.*). A corporation, being fixed by its charter within the State which created it, cannot acquire a domicil outside the State (*Brewing Co. v. Dreyfus*, i. 213).

§ 34. Domicil is to be distinguished from similar things, like fixed place of abode (*CHITTY*, J., in *Tootal's Trusts*, i. 159); residence (*Haggart v. Morgan*, i. 177); settlement (*PARKER*, J., in *Putnam v. Johnson*, i. 172; i. 178 *n.*); inhabitancy (*Borland v. Boston*, i. 197).

§ 35. The jurisdiction of a State in general and for the making of laws having been considered, jurisdiction for laying commands through the courts and for enforcing the power to tax remains to be considered.

Taxation is exacted either from persons or from property; jurisdiction to tax therefore depends upon jurisdiction over person or property. Besides the strict power of taxation, there is the similar power of exacting a fee in return for some privilege conferred by the State.

Taxation of persons extends to citizens or subjects everywhere, and to all persons domiciled in the territory, though temporarily absent. Persons merely temporarily within the territory are not taxed. The tax upon persons may be the levy of an arbitrary sum on each person (poll-tax), or a tax the amount of which is graduated upon the amount of his property, such as an income-tax (i. 252 *n.*), or a tax upon all the person's movables, wherever situated. A tax of the latter sort is usually confused with a tax on property; but it seems clear that it is not strictly a tax on property, since the jurisdiction to tax and the power to collect the tax do not extend to movables abroad (*McKeen v. Northampton*, i. 222; *S. v. Bentley*, i. 223 *n.*; *GRAY*, J., in *Estate of Swift*, i. 246). For the same reason a tax, the amount of which is fixed by the amount of incorporeal property, seems to be a personal and not a property tax.

A property tax may be laid upon all property within the territory, whether immovable or movable (*Hoyt v. Commrs.*, i. 218). But as has been seen, incorporeal property has no real situs (§ 25), and a property tax can therefore not be laid upon incorporeal things. At any rate, they cannot be taxed at the debtor's domicil as property there situate (*State Tax on Foreign-Held Bonds*, i. 224). If, however, the incorporeal right is evidenced by a document valuable in itself (§ 25), it may be taxed as a chattel where the document is

found (FIELD, J., in *State Tax on Foreign-Held Bonds*, i. 228; *New Orleans v. Stempel*, i. 238).

By the common law personal property is not taxable where found unless it is in a sense abiding there, incorporated with the mass of property there existing. Thus a tax is not laid upon a passing vessel (*Hays v. S. S. Co.*, i. 215) or railroad car in transit (*P. P. Car Co. v. Pennsylvania*, i. 230).

A privilege tax may be laid for the exercise of any privilege conferred by law. Such are license fees for the privilege of transacting business (FIELD, J., in *State Tax on Foreign-Held Bonds*, i. 227), probate duties (MORTON, J., in *Frothingham v. Shaw*, i. 251; i. 252 n.), legacy duties (*In re Tootal's Trusts*, i. 154; MORTON, J., in *Frothingham v. Shaw*, i. 251; i. 252 n.), and succession duties or inheritance taxes (*Estate of Swift*, i. 244; *Frothingham v. Shaw*, i. 249).

§ 36. Jurisdiction of a court may be jurisdiction over persons, over things, or over personal relations or rights of inheritance.

A court has jurisdiction over every person who is actually served with process within the State (*Darrah v. Watson*, i. 298; but see *Abercrombie v. Abercrombie*, iii. 342), over non-resident citizens or subjects (*Douglas v. Forest*, i. 285; BLACKBURN, J., in *Schibsby v. Westenholz*, i. 292), and over all persons domiciled within the State (BLACKBURN, J., in *Schibsby v. Westenholz*, i. 292; *Henderson v. Stanford*, i. 297). But (unless by consent) the court has no jurisdiction over an absent non-domiciled foreigner (*Buchanan v. Rucker*, i. 283; *Schibsby v. Westenholz*, i. 288; *Bld. & Ins. Assoc. v. Hudson*, i. 324). The fact that a foreigner owns property within the State does not give the court personal jurisdiction over him (BLACKBURN, J., in *Schibsby v. Westenholz*, i. 288; *Pennoyer v. Neff*, i. 341), nor does the fact that the obligation on which suit is brought was contracted within the State (*Singh v. Faridkote*, i. 294).

Jurisdiction may, however, be exercised over an absent foreigner by his express consent; as if he applies to the court as plaintiff, or voluntarily appears by counsel (BLACKBURN, J., in *Schibsby v. Westenholz*, i. 292, 293; *ex parte Blain*, i. 311) or authorizes a confession of judgment (*S. M. Co. v. Radcliffe*, i. 314). So he is held to have consented if he joins a company which contains in the articles of association an express provision that the members shall be subject to the jurisdiction, though it would not be enough if the law of the State where the company was formed so provided (*Copin v. Adamson*, i. 308). It is on the ground of consent to the jurisdiction of the court, that suit is maintained against a foreign corporation (*St. Clair v. Cox*, i. 300).

Jurisdiction over a person once having been obtained, continues throughout all subsequent proceedings that form part of the same litigation (*Fitzsimmons v. Johnson*, i. 318).

A court of equity, since it proceeds only *in personam*, must have

personal jurisdiction. Having such jurisdiction, it may order a defendant to do any act which may be done within the State, though it concerns property outside the jurisdiction of the court: as to make a deed (*Massie v. Watts*, i. 328) or even to execute a power of sale (*Lynde v. Ry.*, i. 334) of foreign lands; but it may not order any act to be done which must be done outside the State (*White v. White*, i. 332).

§ 37. The jurisdiction over corporeal things, *i. e.* jurisdiction *in rem*, exists over all corporeal property within the jurisdiction. It is exercised by an admiralty court over all vessels coming within the territory; though the court often declines jurisdiction where only foreigners are interested, and it is possible to get complete justice elsewhere (*The Belgenland*, i. 262).

Jurisdiction *in rem* extends also to all land within the State; and any judicial process may be authorized to bind such land (*Arndt v. Griggs*, i. 268; *Tyler v. Judges*, i. 277).

A proceeding *in rem* in order to be such must be so framed as to set up a claim to the *res* itself (*HOLMES*, C. J., in *Tyler v. Judges*, i. 281; *FIELD*, J., in *Pennoyer v. Neff*, i. 347).

§ 38. A jurisdiction *quasi in rem* may be exercised by a court in subjecting all property of a debtor which is found within the jurisdiction to the payment of the debt. This differs from an action strictly *in rem* in that there is no claim made to the property except incidentally as a means of obtaining redress for a wrong which has no connection with the property. But since the object of the suit is to obtain the property, the court having power over the property has jurisdiction to maintain the suit. As in other actions *in rem*, the proceeding is based upon a claim to the property, and the jurisdiction does not exist unless a claim to the property is made the basis of the suit (*Pennoyer v. Neff*, i. 341; *Woodruff v. Taylor*, i. 354).

If the property is a chattel in the hands of a third party, this proceeding may take the form of a foreign attachment or garnishment; but the jurisdiction still depends upon the chattel being within the State (*Sutherland v. Bank*, i. 361).

If it is attempted in this way to reach a chose in action (as by the process of garnishment) it would seem clear that jurisdiction must depend upon the power of the court to control and discharge the obligation (*Mahr v. Ins. Soc.*, i. 363), and that since a chose in action has no situs (§ 25) this requires control over both parties to the obligation it is attempted to reach (or perhaps over the debtor and the place of payment, *R. R. v. Nash*, i. 372; § 25). And it is sometimes so held (*R. R. v. Nash*, i. 372). But by the prevailing view the court has jurisdiction wherever the garnishee can be found (*Ry. v. Sturm*, i. 377), though in some jurisdictions, if both parties are not before the court, the garnishee must be domiciled within the State (*Renier v. Hurlbut*, i. 368).

This process does not prevail in the same form in civil-law coun-

tries. By the French law the debt or chattel may be seized and retained pending a judgment upon the original claim by a court having jurisdiction (*Tedesco v. Dumont*, i. 388). By the Roman-Dutch law it seems that a seizure in the nature of garnishment can be made only by a court which has jurisdiction of the principal claim (*Einwold v. W. A. Co.*, i. 383).

§ 39. The jurisdiction of a court to affect a personal relationship between parties depends usually upon the domicile of the parties. Thus a court has jurisdiction to grant a divorce only if the parties are domiciled within the jurisdiction (Lord Watson in *Le Mesurier v. Le Mesurier*, i. 392). "Matrimonial domicile," so called, that is, mere residence while the marriage exists, is not enough to give jurisdiction (*Le Mesurier v. Le Mesurier*, i. 388).

Where the husband and wife are living apart, it is permitted in the United States generally that the court of the wife's domicile (§ 33) may grant her a divorce (*Ditson v. Ditson*, i. 399; see i. 406 *n.*). In England it seems that the court of the last domicile in which the parties lived together may grant a divorce to the wife, who has remained there, even if the husband, after leaving the wife, has acquired a domicile elsewhere (BARNES, J., in *Armstrong v. Armstrong*, i. 394). But no divorce can validly be granted in a State which is the *bona fide* domicile of neither party (*S. v. Armington*, i. 407).

In New York a peculiar doctrine prevailed that if the parties had separate domicils the court at one domicile might validly divorce the party there, but having no jurisdiction over the other party it must leave him married (*P. v. Baker*, i. 408). This curious and indefensible doctrine has however been overthrown (*Atherton v. Atherton*, 181 U. S. 155).

It has been held that a judicial separation may be decreed at the actual residence of the petitioner (*Armstrong v. Armstrong*, i. 393).

It is uncertain whether the court of the domicile or that of the State which created the marriage status (§ 57) has jurisdiction of a suit for nullity of marriage (*Turner v. Thompson*, i. 414; *Cumington v. Belchertown*, i. 415; i. 419 *n.*; *Roth v. Roth*, iii. 34).

Rights of inheritance (as distinguished from the title to specific property) are within the jurisdiction of the domicile of the deceased; the courts of that State have jurisdiction to declare the validity of a will (*Overby v. Gordon*, iii. 377).

§ 40. The rules as to the jurisdiction of courts which prevail in foreign countries are confused and contradictory. The French law (since the Code Napoleon), which has been followed in the later codes of several European countries, refuses jurisdiction to a foreign court to issue judgment against a Frenchman, even if he is domiciled in the foreign country. In France this right of the Frenchman may be waived by him by expressly submitting to the foreign court (*Van Heyden v. Sauvage*, i. 326) but not otherwise (*Young v. Dreyfus*, i. 339). In Italy no waiver is allowed (*Girard v. Tramontano*, i. 327).

On the other hand, France claims jurisdiction to issue judgment against an absent foreign defendant at the suit of a Frenchman (*Girard v. Tramontano*, i. 327), and the same claim is made in most European countries, though the jurisdiction is usually exercised only when the obligation in suit arose within the country.

For divorce, the modern European law gives jurisdiction to the courts of the husband's nation only (*W's Marriage*, i. 428; i. 428 *n.*; *Tirveillot v. Tirveillot*, i. 431); but when the petitioner is a resident foreigner, and the whereabouts of the other party unknown, so that the petitioner can find no other court, a French court has entertained her suit (*Wilhelm v. Wilhelm*, i. 427). "Provisory measures," such as separation from bed and board, alimony, etc., may be decreed by the court of the residence of the parties (*Tirveillot v. Tirveillot*, i. 431).

By the Scotch and the Roman-Dutch law the court of the matrimonial domicile has jurisdiction for divorce (*Weatherley v. Weatherley*, i. 420).

IV.

CREATION OF RIGHTS.

§ 41. Rights being created by law alone (§ 2), it is necessary in every case to determine the law by which a right is created. The creation of a personal obligation, which has no situs (§ 25) and results from some act of the party bound, is a matter for the law which has to do with those acts. A personal obligation, then, is created by the law of the place where the acts are done out of which the obligation arises.

Where acts are done in one State by the procurement of a party who remains in another State, the acts being actually performed by an agent, the obligation is created by the law of the place where the agent acts.

§ 42. A right to tangible property is of a different sort. The property, whether movable or immovable, has an actual situs within some State, and nothing can be done with the property against the will of the State in which it is. This is equally true of movable as of immovable property; for though the movable property is physically capable of being taken into another State, the State in which it now is may prevent the removal. The State in which the property is has therefore jurisdiction to determine the title to the property; and rights in tangible property are determined by the law of the situs.

It has often been said that while this is true of immovable property, movables are governed by the law of the owner's domicile. This notion, however, does not find support in the cases (*Green v. Van Buskirk*, ii. 160).

§ 43. Right of inheritance to property is treated differently, according as the property is movable or immovable. If the property is immovable, its transfer by inheritance, like any other transfer, is determined by the law of the situs (*Birtwhistle v. Vardill*, iii. 42; *Van Matre v. Sankey*, iii. 53). But inheritance to movables, both corporeal and incorporeal, is governed by the law of the domicile of the deceased. This, in the case of chattels, is however because the law of the situs permits it; the State of situs may so change the law by statute that the inheritance of the chattels will be governed by her own law of inheritance (ii. 255 *n.*).

§ 44. The creation of a personal status depends generally upon the law of the domicile of one of the parties. Thus the status of legitimate child is determined by the law of the father's domicile; the status of a corporation by the law of its domicile (that is, of the State which charters it) etc. The law that governs marriage is more difficult to determine; it is sometimes held to be the law of the domicile of both parties, sometimes that of the domicile of the husband, sometimes that of the place of celebration.

§ 45. Personal capacity to enter into an obligation, to take or transfer property, etc., is sometimes regarded as a personal status, to be regulated therefore by the law of the domicile. This is the universal doctrine in Europe, except that (following the Code Napoleon) the status is in most countries governed by nationality rather than by domicile. This doctrine is however found unworkable in practice, and is subject to numerous exceptions. Thus, it is held not to apply to the conveyance of land (*D'hervas v. Bonnar*, ii. 32), or to ordinary acts of commerce done *bona fide* (*Fourgeaud v. Santo Venia*, ii. 35), and it may be doubted whether it would ever be applied to the prejudice of a citizen (*De Lizardi v. Chaize*, ii. 34). And the doctrine is not applied in case of a penal incapacity (*Reynaud v. Martel*, ii. 39). The strongest case for the application of the doctrine is where a person, competent by his own law, enters into an obligation in a State by the law of which he is incompetent. Such an obligation has been held binding (*A. v. C.*, ii. 36), but the point has also been decided otherwise (*Manager v. G.*, ii. 33).

§ 46. In England capacity to enter into an obligation appears to have been deemed to be one of the circumstances determining liability, to be governed therefore by the law that creates the obligation (*Male v. Roberts*, ii. 8; CRESSWELL, J., in *Simonin v. Mallac*, ii. 51, 53, 54). And the same rule was applied in determining capacity to marry (*Dalrymple v. Dalrymple*, ii. 41; *Simonin v. Mallac*, ii. 50). But in later cases it was held that capacity to marry is determined by the law of the domicile; and it was stated that the same is true of capacity to contract (*Sottomayor v. De Barros*, ii. 72). The English law as to capacity to contract is not now clear (*Cooper v. Cooper*, ii. 9, 10).

In the United States capacity is held to be governed by the law of

the place of acting (*Milliken v. Pratt*, ii. 15; *Nichols & Shephard Co. v. Marshall*, ii. 21; ii. 9*n.*).

Capacity for other purposes is in general governed by the law which applies to the transactions in question.

V.

RECOGNITION OF RIGHTS.

§ 47. A right having been created by the appropriate law, the recognition of its existence should follow everywhere (FOLGER, J., in *King v. Sarria*, ii. 450). Thus an act valid where done cannot be called in question anywhere (*Dobree v. Napier*, i. 61; i. 64). And a right to land which has accrued will be recognized as valid though the territory is afterwards annexed to a country where the right could not be created (*Chappell v. Jardine*, i. 77). And so a body created as a corporation in one State must be recognized as such in another State (iii. 76*n.*).

This is true even though the right so created is absolutely illegal in the other State. Thus, a polygamous or incestuous marriage contracted in a State where it is valid must be recognized as a legal status of that kind even in a State where it is illegal (*Sutton v. Warren*, iii. 32); though it need not be treated as a so-called "Christian" marriage would be. It is merely recognizing a foreign fact (§ 4). This doctrine, though obvious, has not been universally recognized (STIRLING, J., in *Re Bethell*, iii. 31*n.*; *Roth v. Roth*, iii. 34; *U. S. v. Rodgers*, iii. 36). And there is good authority for the doctrine that if the marriage is against universal notions of decency because between very near relatives it will not be recognized as a possibly legal marriage anywhere (HUBBARD, J., in *Sutton v. Warren*, iii. 32; *Brook v. Brook*, ii. 59).

A slave for the same reason must be recognized as such even in a free State. It is true that if a slave comes into a free State he cannot be restrained by his master; not because he ceases to be a slave, but because in such a State there is no right in a master to restrain a slave (HOLROYD, J., in *Forbes v. Cochrane*, i. 44; WARE, J., in *Polydore v. Prince*, iii. 4, 5).

VI.

ENFORCEMENT OF RIGHTS.

§ 48. Though a foreign right must be recognized as existing, it does not follow that it will be given any legal force. Since a right can have no legal force unless it is given force by law (§ 2), and since

nothing can have the force of law in a State except the law of that State (§ 11), it follows that no foreign right can be enforced unless the law of the State so provides. This depends upon the law as to the enforcement of foreign rights, that is, upon a principle of the Conflict of Laws. The general principle is, that when a right has once been created by the proper law it will be enforced everywhere, even where it would not originally have been created upon the same facts (GRAY, C. J., in *Milliken v. Pratt*, ii. 12; *Greenwood v. Curtis*, iii. 474). And this is true, even if the right is against a citizen of the State in which it is enforced (*Milliken v. Pratt*, ii. 11; but see *Armstrong v. Best*, iii. 487).

§ 49. But since the enforcement comes through the domestic law, that law may refuse to give any effect to the right; and though enforcement will be not denied merely because the creation of the right is opposed to the domestic law, it will always be denied where there would be anything illegal in the enforcement itself. The law will not cause its own harm. Thus enforcement will be denied where the right was created abroad in evasion or fraud of the domestic law (TURNER, L. J., in *Hope v. Hope*, iii. 471; see *Waymell v. Reed*, iii. 446; *Hill v. Spear*, iii. 447), or where it is injurious or of bad example (PARSONS, C. J., in *Greenwood v. Curtis*, iii. 474) or against public policy (*Emery v. Burbank*, iii. 484; *Delaunay v. Ins. Co.*, iii. 497) or against morality (*Flagg v. Baldwin*, iii. 461). Thus where a foreign marriage is valid, and the parties come into a State where it is regarded as incestuous, they may be forbidden to cohabit as man and wife in that State (*S. v. Brown*, iii. 37 cited).

§ 50. It is a general rule that one State will not enforce penal obligations created in another. Though all courts admit this principle, they differ as to the meaning of penal obligation. All agree that no suit can be brought for the punishment of a foreign crime, and it is usually held that an incapacity imposed abroad merely as a punishment will not be regarded (*C. v. Green*, iii. 9; iii. 18; *Martel v. Reynaud*, iii. 21; but see *Re Nikitchenkow*, iii. 19; conviction in annexed territory before annexation is regarded as domestic conviction, *Thomas v. Gardet*, iii. 20). But the Supreme Court of the United States and the Privy Council of England have held that the principle covers only obligations imposed as punishment for crime, and not forfeitures of property to individuals by way of redress (*Huntington v. Attrill*, iii. 411). Most courts, however, will enforce only such foreign rights of action as are given against wrongdoers as mere compensation for the wrong done to the plaintiff. Thus, they refuse to enforce a foreign obligation to support a bastard child (*Graham v. Monsergh*, iii. 402) or a son-in-law (*De Brimont v. Penman*, iii. 403), to forfeit treble damages for usury (*Blaine v. Curtis*, iii. 408), and to pay arbitrary statutory damages for failure to transmit a telegram (*Taylor v. Tel. Co.*, iii. 410). And where a foreign statute creates a right against a railroad company for injury

to an individual, action cannot be brought abroad if the damages given are arbitrary, bearing no relation to the harm or to the plaintiff's share of the loss (*O'Reilly v. R. R.*, iii. 440).

The statutory liability of stockholders in a corporation may be either contractual or by way of forfeiture. If the liability is contractual, running to the creditors from the time the debts were created, it is enforceable in any State (*Bank v. Ellis*, iii. 430). If the liability is penal it cannot be enforced abroad (*Bank v. Rindge*, iii. 427). The nature of the liability must be determined by the State which creates it; but whether a liability of such a nature is penal or not must be determined by the State in which enforcement is sought.

The statutory liability of directors in a corporation may also be either contractual or penal. Thus the director's liability for all debts contracted beyond the capital paid in is an original liability, entered into by the director each time such a debt is contracted; being contractual, it may be enforced in any State (*Farr v. Briggs*, iii. 418). But liability imposed upon a director for debts already contracted, because of his failure to file proper returns, is obviously penal in the sense of the decisions above examined, since the liability bears no proportion either to the amount of harm done by his act or to the creditor's loss by it. It is accordingly usually held that it cannot be enforced in another State (iii. 418 *n.*; *contra*, *Huntington v. Attrill*, iii. 411).

§ 51. When an occasion arises for treating a whole estate together (as during infancy or other guardianship, at marriage, bankruptcy, or death), while the title to the estate is ordinarily dealt with in accordance with a single proper law, the administration of the estate, that is, the payment of debts and the disposition of the balance, is as to each portion of the estate according to the law of its situs, without regard to the law which settles the ultimate title (*Pardo v. Bingham*, iii. 161; iii. 189 *n.*; *Trust Co. v. Dodd, Mead, & Co.*, iii. 228).

VII.

REMEDY.

§ 52. The remedy afforded for the enforcement of a foreign right is such only as the State may choose to allow. The State may open its courts to whom it pleases. By the common law as generally understood foreigners are allowed free access to the courts (*Roberts v. Knight*, i. 448). Modifications of the general principle have been made in a few jurisdictions. The doctrine of one English case, that suit between foreigners on a mere foreign claim will not be entertained (*Matthaei v. Galitzin*, i. 440), appears not to represent the English law; but in New York no non-resident has a right to sue another non-resident for a tort committed abroad (*Gardner v. Thomas*,

i. 446), though the parties will not be turned out of court if the defendant does not seasonably object (*Burdick v. Freeman*, i. 450). A foreigner may however sue another for breach of a contract made abroad (*Smith v. Crocker*, i. 448 *n.*). In Texas no suit can be brought against a non-resident who can be reached in his own courts upon a cause of action given by a foreign law which differs from that of Texas (*R. R. v. Jackson*, i. 459).

In France suit will not ordinarily lie between foreigners. If, however, one of them has a business domicile in France (*Vanguilbert v. Vandevière*, i. 461) or if the suit grows out of a commercial transaction in France (*Kowalski v. Mocaluvo*, i. 462) suit is allowed.

In Admiralty suit is not allowed where the whole contention is foreign, and justice does not require the maintenance of the action (*The Belgenland*, i. 262).

Where a foreign right requires for its proper enforcement a special form of action which is unknown in another State, it cannot be enforced in the latter State. This is the case with the statutory stockholders' liability created in several States (*Erickson v. Nesmith*, iii. 423).

§ 53. No suit can be brought for the punishment of a crime committed in a foreign State (*DE GREY*, C. J., in *Rafael v. Verelst*, i. 434), since a foreign penalty is not enforced (§ 50). Action may be brought on any merely personal right, though the cause of action is a foreign one (*Rafael v. Verelst*, i. 433; *Mostyn v. Fabrigas*, i. 435; *Anon.*, i. 446). But of course no action can be brought for the purpose of affecting the title or possession of foreign land (see § 37). And it is generally held that no action will lie for any injury to foreign land, since the title to the land may be brought in issue (*South African Co. v. Co. de Mozambique*, i. 442). Since, however, the question of title is raised only incidentally, and the judgment cannot affect the title, the refusal of an action in such a case is unnecessary (*Little v. Ry.*, i. 451).

§ 54. Where suit is brought in a foreign court, all matters relating merely to the remedy are determined by the law of the forum (ii. 369 *n.*). Thus the law of the forum determines the right of arrest (*De la Vega v. Vianna*, i. 463), the proper parties (*Bullock v. Caird*, i. 464), the proper form of action (*Le Roy v. Beard*, i. 465), the exemptions from attachment (*Mineral Point R. R. v. Barron*, i. 467; i. 468 *n.*), the right to set-off (*Gibbs v. Howard*, i. 468), the right to confess judgment (*Hamilton v. Schoenberger*, i. 466). The law of the forum determines whether action is barred for usury (*Gale v. Eastman*, ii. 430) or for failure to comply with the statute of frauds (ii. 369 *n.*), where usury or the statute of frauds goes rather to the remedy than to the right. If it is claimed that remedy is barred by the statute of limitations, it is the statute of the forum which decides (*Townsend v. Jemison*, i. 469), unless indeed some statute which has power to do so has actually extinguished the right. That may hap-

pen where it was a condition of the right at the time of its creation that it should be exercised within a certain time (*The Harrisburg*, i. 476; *B. & L. Assoc. v. Stockton*, i. 478), or where (as often in the Civil Law) the lapse of time extinguishes the right itself (*prescription libératoire*) (*Hamida v. Benaiad*, i. 482).

The rules of evidence applied are those of the forum (i. 484 *n.*), as for instance whether a stamp is required before a document may be admitted in evidence (i. 485 *n.*); and so presumptions of fact are determined by the law of the forum (*Hoadley v. Transportation Co.*, i. 483). The measure of damages, since it has to do with the nature of the right of action, must be determined by the law of the State where the action arose; it is not a question of remedy (*PAYNTER, J.*, in *R. R. v. Whitlow*, ii. 330; see *Meyer v. Estes*, i. 488 *n.*). So interest, where given by way of damages, is regulated by the law of the place of payment, not of the forum (*Peck v. Mayo*, i. 485; *Healy v. Gorman*, ii. 474; *contra*, *Ayer v. Tilden*, i. 487). It has been intimated that exemplary damages depend upon the law of the forum (*BARKER, J.*, in *Higgins v. R. R.*, ii. 323). This is certainly sound if the forum does not allow such damages, since it is a matter of policy; but if such damages are not allowed where the right accrues, it would seem improper to allow them in any jurisdiction. Costs have to do with the remedy alone, and depend upon the law of the forum (*Commercial Bank v. Davidson*, i. 488; *BARKER, J.*, in *Higgins v. R. R.*, ii. 323).

Where, however, a statutory regulation of damages amounts not to a settlement of the rules for measuring compensation but to a limitation (irrespective of the amount of damage) of the amount allowed to be recovered, it has to do with remedy rather than with right, and is governed by the law of the forum (*FINCH, J.*, in *Wooden v. R. R.*, ii. 334; compare *R. R. v. Babcock*, ii. 335).

In Admiralty the adjustment of general average is by the law of the place of adjustment (*Loring v. Ins. Co.*, ii. 548).

PART II.

PARTICULAR APPLICATIONS.

I.

PERSONAL STATUS.

§ 55. Personal status, in the legal sense, is some artificial personal condition, created by law, and remaining until changed by law. The condition must be an artificial one; if it is a natural condition, the law is powerless to create or dissolve it, and it therefore is a fact, not a legal relation. Since it is a continuing condition, it chiefly interests the State in which the person habitually lives, that is, his domicile; and, as has been seen, personal status is usually governed by the law of the domicile (§ 44).

The Civil Law of Europe regards Legal Capacity as a status, to be created by some law, and to continue until put an end to by law (A. Pillet, ii. 3; § 45). The Common Law has never so regarded Capacity. Capacity to do an act is a natural condition, a question of fact; the legal result of the act when done (of course by one having capacity in fact to do it, since otherwise it could not be done) is determined by the law which applies to the act.

Since insanity is a natural fact, a judicial declaration that one is a lunatic does not create a status (*Didisheim v. Bank*, iii. 189).

On the other hand, certain legal declarations affecting the person do not create a status because they do not affect the condition of the person, but only his rights. Thus foreign interdiction (such as placing a party under guardianship as a spendthrift) does not change his status, and is not regarded in another State (*Worms v. De Valdor*, iii. 22; *Gates v. Bingham*, iii. 23; *contra* in France, *Fay v. Oppenheim*, iii. 26). For the same reason, removal of incapacity by a court or legislature having control over the person does not give him a status which will be recognized elsewhere (*S. v. Bunce*, iii. 25). For this reason also bankruptcy is not a status (though a dictum of LINDLEY, M. R. in *Re Pearson*, i. 313 *n.* is *contra*).

§ 56. Nobility is a status, and as such is to be governed by the law of the country which creates it (Affair of Sayn-Wittgenstein-Sayn, ii. 101), being peculiar in this respect, that a man may be made noble by any law, not necessarily that of his domicile. Slavery is a status, created by the law of the domicile, it would seem, and continuing until some law having power to do so makes the slave free. A slave cannot be restrained, to be sure, in a free State; but that is because there is no law justifying restraint; the slave does not cease to be such by merely coming into a free State (*Somerset v.*

Stewart, iii. 1; SHAW, C. J., in *C. v. Aves*, iii. 7, quoted). Civil death is a status; so is conviction of crime, which has civil effects that can be removed only by pardon.

In all these cases, though the status continues wherever the subject of it may go, no effect need be given to the status in another State. Thus the capacity of a witness is not affected by foreign conviction (*C. v. Green*, iii. 9). Capacity to marry is not affected by foreign civil death (*Kynnaid v. Leslie*, iii. 13; *contra*, *Marotte v. Griffon*, iii. 16). Capacity to sue is not affected by foreign slavery (*Polydore v. Prince*, iii. 2) or civil death (*Wilson v. King*, iii. 15). Capacity to vote is not affected by foreign conviction (*In re Blanchard*, iii. 18).

§ 57. Marriage is a legal status of great importance, which in accordance with general principles would be governed by the law of the domicile of one or both of the parties. To this rule, however, there are great practical objections. It is the policy of the law to encourage marriage rather than illegitimate cohabitation; and it is extremely impolitic that a marriage recognized in one place as valid should in another place having equal power over the matter be held invalid (*Anon.*, iii. 38). But if the law of the domicile controls, since there are two parties to a marriage, the domicile of either might hold the marriage invalid in spite of the contrary view of the other. This would not only encourage concubinage; it might compel it, since the State holding the marriage valid might insist upon cohabitation.

The difficulty would be avoided by considering marriage as a status which by universal law follows a valid contract of marriage. A law which created a legal contract of marriage would then suffice to create the status; in other words, the validity of the marriage would depend upon the validity of the contract, and that in turn would depend upon the law of the place of celebration.

Such appears to have been universally held at one time. The earlier French (*Anon.*, iii. 38) and English (*Dalrymple v. Dalrymple*, ii. 41) cases so held. This is the prevailing law in the United States to-day, with the possible exception of marriages incestuous by the common consent of civilized nations (*C. v. Lane*, ii. 86).

In England, where the old law long prevailed (*Simonin v. Mallac*, ii. 50) the doctrine was shaken by a confused decision of the House of Lords (*Brook v. Brook*, ii. 59), and it was finally settled that the law of the domicile determines the capacity of parties to marry (*Sottomayor v. De Barros*, ii. 72) though the form of celebration is still held to be that provided by the law of the place of celebration (*Lord CAMPBELL* in *Brook v. Brook*, ii. 61).

What happens where the parties are of different domicils, and the laws of their respective domicils differ as to capacity, is, as has been pointed out, a difficult question (CRESSWELL, J., in *Simonin v. Mallac*, ii. 58). It now seems settled in England that if either of the parties is English the law of that State will determine the legality of the marriage (*Shaw v. Gould*, ii. 107; *Sottomayor v. De Barros*, ii. 75 *n.*).

The French law now, like the English, makes every marriage to which one party is French depend upon the French law; the law being, however, that of the nation of the party, not that of the domicile (*de Bauffremont v. de Bauffremont*, ii. 99; *Vidal v. Vidal*, iii. 39). Where, however, a Frenchman domiciled abroad is married *bona fide* in accordance with the law of the domicile, the marriage is regarded as valid by French law (*Lhermite v. Choisi*, ii. 105).

A foreign incapacity to marry which is a mere penalty, though created by the domicile, will not even in England (and of course not in the United States) be held to invalidate a marriage good where celebrated. Such is the order of a divorce court to the parties to a complete divorce not to marry (*Scott v. A. G.*, ii. 77 cited; *C. v. Lane*, ii. 85; see *Warter v. Warter*, ii. 76); and such is civil death (*Kynnaire v. Leslie*, iii. 13).

Since the law of the place of celebration governs marriage, at least with regard to form, it would seem that there can be no marriage where no law exists. Thus, there can be no marriage on the high seas, except on a vessel and by the law governing the vessel (*Norman v. Norman*, ii. 44). But it is often said that in a place where no law prevails the parties may be married according to their own law, and this doctrine is sometimes extended to cover the case where law exists, but would not permit any marriage between the parties (ii. 50 *n.*). In one case it was held that where parties were married abroad they could choose the forms of their own country rather than those prevailing at the place of celebration (*Anon.*, ii. 103).

Marriage by proxy, the parties being domiciled in different places and not being in the same State at the time of the celebration, offers great difficulty in theory (*In re Lum Ying*, ii. 43).

§ 58. A marriage which is valid by the proper law should be recognized as such everywhere (*Sutton v. Warren*, iii. 32; *C. v. Lane*, ii. 85; *Plaquet v. Lille*, iii. 41; *Wall v. Williamson*, ii. 77. *Contra*, *Roth v. Roth*, iii. 34; *U. S. v. Rodgers*, iii. 36). And it should ordinarily be given the same effect in each State as a marriage there created. But if to give it such effect would be against the policy of the law, or contrary to good morals, the marriage will be given no effect. Thus if the marriage is regarded as incestuous in any country the parties may be forbidden to cohabit there (*S. v. Brown*, iii. 37 cited), and so of a marriage between a negro and a white person (*Kinney v. C.*, ii. 93; compare *Medway v. Needham*, ii. 88 cited). So if the parties were married outside their own State in order to evade its law, that State may decline to give the marriage effect (*CRESSWELL, J.*, in *Simonin v. Mallac*, ii. 59; *Brook v. Brook*, ii. 59; see *GRAY, C. J.*, in *C. v. Lane*, ii. 88).

The effect of marriage upon the rank of the wife depends upon the law that gives the rank (*Affair of Sayn-Wittgenstein-Sayn* ii. 101).

Its effect upon the property of the parties will be considered below (§ 72).

A polygamous marriage not being of a sort contemplated by the law of divorce, no divorce will be granted for such a marriage, though it was valid (*Hyde v. Hyde*, iii. 27).

§ 59. Divorce as putting an end to the status of the marriage is regulated by the law of the domicile of the parties (§ 44). The law which created the marriage is not concerned in the divorce (*Warrender v. Warrender*, ii. 64. cited; Lord WESTBURY and Lord COLONSAY in *Shaw v. Gould*, ii. 116, 118). A divorce good by the proper law will be recognized everywhere; thus a divorce of American Indians by mutual consent, according to their tribal law, is everywhere recognized as valid (*Wall v. Williamson*, ii. 77).

A decree of nullity of marriage, however, does not put an end to the status, but officially declares that it never existed. This must certainly be declared in accordance with the law which created the marriage, and, it would seem, in courts which administer that law (*Cumington v. Belchertown*, i. 415; but see *Roth v. Roth*, iii. 34).

§ 60. The condition of legitimate child is a status, founded to be sure on a natural relation, but impressed by law with the quality of legitimacy. The status of legitimacy is conferred by the law of the father's domicile at the birth of the child (*In re Andros*, iii. 49). In a case in the House of Lords, however, legitimacy (without much consideration) was determined not by the father's domicile at birth of the child, but by the mother's capacity to marry (*Shaw v. Gould*, ii. 107; see Lord COLONSAY, ii. 119; the question was, however, whether the child was the legitimate child of the mother). Even if the marriage is unlike a "Christian" marriage, for instance is polygamous or incestuous, the legitimacy of the child should be determined by the law of the father's domicile (*Wall v. Williamson*, ii. 79; ii. 80 *n.*; see, however, *Roche v. Washington*, ii. 81; *In re Bethell*, iii. 31 *n.*). And if the child is legitimate by the proper law, this legitimacy should be recognized everywhere (*In re Andros*, iii. 49; but see Lord CRANWORTH in *Shaw v. Gould*, ii. 107).

§ 61. A child born a bastard may be legitimated by law after its birth, as by subsequent marriage of the parents. It appears to be necessary that the law of the father's domicile at the time of the child's birth and the law at the time of the father's marriage should concur in order to make a bastard legitimate in this way; that is, the child must not only be a child of the father by nature, but must by law be endowed at birth with the capacity of becoming legitimate (*In re Grove*, ii. 120). In France, however, it has been held sufficient that he is capable by the law of his mother's domicile (which is his own domicile) at birth, and is legitimated by marriage by that law (*Skottowe v. Ferrand*, ii. 139). A bastard may also be legitimated by statute; this should be a statute of the State of the father's domicile (*Scott v. Key*, ii. 124; but see *Barnum v. Barnum*, ii. 127).

A bastard, without being fully legitimated, may be given the legal status of recognized natural child, wherever such a status is established by law. This status is conferred by the law of the father's domicile at the time of the act of recognition (*Anon.*, ii. 141; *Blythe v. Ayres*, ii. 132; *Eddie v. Eddie*, ii. 136). What the effect of such recognition shall be, for instance, upon the obligation to pay a legacy or succession tax in another State depends upon the law of that State (*Skottowe v. Young*, ii. 140 *n.*; *Atkinson v. Anderson*, iii. 47).

§ 62. The status of adoption should be carefully distinguished from that of legitimation (see a confusion, for instance, in *Eddie v. Eddie*, iii. 136). Adoption is the establishment of a legal relation between persons who have (so far as the essentials of the relation are concerned) no natural relation; while legitimation is possible only where a natural relation exists. Adoption must be conferred by the law of the domicile of the parties or of one of them at least (*Ross v. Ross*, ii. 128), and should everywhere be recognized.

§ 63. Wardship of the person is a legal status, to be created at the domicile of the ward. When so created it should be enforced everywhere by recognizing the power of the guardian over the person of the ward (*Nugent v. Vetzera*, iii. 56; *A. v. B.*, iii. 65), at least unless the circumstances make it a violation of public policy to do so (*Woodworth v. Spring*, iii. 62).

§ 64. Incorporation is a status created by the law of the chartering State; and the corporation has the nature and the powers which that State confers (*TANEY, C. J.*, in *Bank of Augusta v. Earle*, iii. 70; iii. 75 *n.*), and all matters concerned with its existence and its nature should be determined by the law of that State (iii. 76 *n.*). The existence of the corporation must everywhere be recognized; and it is ordinarily allowed to act like a domestic corporation in every State (*Bank of Augusta v. Earle*, iii. 67). But any State may forbid a foreign corporation to act within it (iii. 75 *n.*), and it does so whenever the desired act would be repugnant to the policy of the State (*TANEY, C. J.*, in *Bank of Augusta v. Earle*, iii. 74). As to all rights and liabilities of a corporation created as a result of acting in a foreign State, it is to be dealt with entirely according to the law of the State in which it acts (*Ins. Co. v. Massachusetts*, iii. 76).

II.

PROPERTY.

§ 65. Property, for the purpose of this subject, may be regarded as of three sorts: immovable property, movable chattels, and choses in action. The international distinction is between immovable and movable property, rather than between real and personal. Immovable property cannot be taken outside the power of the State, and is

therefore permanently within its jurisdiction; movable property is capable at any time of being taken into another State and thereby subjected to another law.

A chattel real, being immovable, is, like land, necessarily subject to the law of the situs (*Duncan v. Lawson*, ii. 143). And the law of the situs may subject movable property to the same rules as movable, as by providing in the same way for its inheritance or transfer, or by legally annexing it to land (*McCullum v. Smith*, ii. 145). In short, it is for the situs of property to determine its legal nature (*Messimy v. Registry*, ii. 148).

§ 66. All questions as to the title to land and rights in it depend upon the law of the situs. Thus capacity to convey (*Swank v. Hufnagle*, ii. 23; *Sell v. Miller*, ii. 25), the form and other requisites of conveyance (*Clark v. Graham*, ii. 150), the existence of incumbrances and liens (*Campbell v. Coon*, ii. 152) and the laws of inheritance (*Birtwhistle v. Vardill*, iii. 42; *Van Matre v. Sankey*, iii. 53) of land all depend upon the law of the situs.

§ 67. Though it is often said that title to chattels depends upon the law of the domicile of the owner (FOLGER, C. J., in *Edgerly v. Bush*, iii. 87), this is not sound (DAVIS, J., in *Green v. Van Buskirk*, ii. 166), and the true rule is that title to chattels is acquired solely by the law of the situs at the time (*Cammell v. Sewell*, ii. 154; *Marvin Safe Co. v. Norton*, ii. 171. So by the Civil Law; *Badin v. Ayme*, ii. 189; *Mahler v. Schirmer*, ii. 190). Thus whether a sale is fraudulent is determined by that law (*Green v. Van Buskirk*, ii. 160; so in the Civil Law, *Conteaux v. Varthaliti*, ii. 194); so whether a transfer is a good *donatio causa mortis* (*Emery v. Clough*, ii. 168). Chattels escheat to the State in which they are situated (STORY, J., in *Harvey v. Richards*, iii. 177).

If title is validly acquired by the law of the situs, it is recognized and enforced in another State into which the goods are subsequently carried (*Langworthy v. Little*, ii. 158; ii. 158 *n.*; *Pond v. Cook*, iii. 83). So title to the goods acquired by the statute of limitations of the situs is recognized in another State (ii. 158 *n.*; *Waters v. Barton*, iii. 80). If, however, the property was taken into the State where title was passed without consent of the owner, it has been held that the title would not be recognized in the owner's State (*Edgerly v. Bush*, iii. 86).

This doctrine is applied to the registration of a mortgage or other lien on a chattel. The registration required is that called for by the law of the situs at the time of creating the lien, and if the requirements of that law are satisfied the lien is upheld in any State into which the property may be carried (*Langworthy v. Little*, ii. 158; *Greenville Bank v. E. S. B. Co.*, ii. 159 *n.*; *Cleveland Machine Works v. Lang*, ii. 176; *Knowles Loom Works v. Vacher*, ii. 179; but see *Hervey v. R. I. Locomotive Works*, ii. 166).

§ 68. A chose in action has no situs (§ 25). So far as it can be

regarded as property it is assignable; and the result of such assignment is to give to the assignee such rights as the assignor had in the obligation. An assignment between parties is effected by means of a contract; its validity depends upon the validity of the contract, and is therefore determined by the law of the place of assignment (*Lee v. Abdy*, ii. 462; *PECKHAM, J.*, in *Guillander v. Howell*, iii. 207; iii. 207 n.; but see *Jackson v. Tierman*, ii. 467). Thus the indorsement of a note is governed by the law of the place of indorsement (ii. 514 n.; but see *Lebel v. Tucker*, ii. 512). In the same way the assignment of a share of stock, as between the parties, is determined by the law of the place of assignment (*Williams v. Colonial Bank*, ii. 464). Where a chose in action is transferred by a court (as a result of divorce, for instance), it must be by a court having jurisdiction over the owner (*Carter v. Ins. Co.*, ii. 187).

Some incorporeal rights, however, have a situs for certain purposes (§ 25), and this may modify the question of transfer. Thus a judgment must be transferred by the law of the court which granted it, and a promissory note may legally be transferred by a court of the State where it is situated (*Alcock v. Smith*, ii. 514). So the question who is entitled to be registered as stockholder in a company (a different question from who has title to the share, *LINDLEY, L. J.*, in *Williams v. Colonial Bank*, ii. 466) is for the law of the chartering State, by which law alone, therefore, the right of the shareholder may be reached by legal process (*Masury v. Bank*, ii. 181). Upon this principle, and treating the case as if it involved the transfer of a chattel, an English court has held that the right to call for payment on shares may be reached by legal process in the State of the stockholder's domicile (*In re Queensland &c. Co.*, ii. 182).

§ 69. A trust in property when created by the owner may be treated as an interest in the property, though to be sure the law in the absence of statute has no way of enforcing this interest except by personal proceedings against the trustee. But a merely constructive trust cannot be regarded in any sense as an interest in property. It is a method of obtaining redress for a wrong done by the constructive trustee.

An express trust in land is treated as an interest in the land, and it must therefore be created in accordance with the law of the situs (*Acker v. Priest*, ii. 200; *Purdon v. Pavey*, ii. 203; *WILDE, J.*, in *Osborn v. Adams*, iii. 219). If, therefore, it creates a legal interest by the law of the situs, that interest must everywhere be recognized (*Siebberras v. De Geronimo*, ii. 204), and if by the law of the situs no interest in the land passes, that also must be accepted everywhere (*In re Piercy*, ii. 279).

A constructive trust in land may however be declared by any court, according to its law, though the land is situated abroad. If the defendant has committed a wrong which by the law of the forum should be redressed by ordering a conveyance of land, such a convey-

ance will be ordered though the land is in another State (*Cranstown v. Johnston*, ii. 195; *ex parte Pollard*, ii. 198).

An express trust of personalty is created by will or by deed of settlement, and is almost everywhere put by law within the oversight of some court. The law governing the trust is not that, for instance, of the trustee's domicile (*Fowler's Appeal*, ii. 206), but the law of the court which had jurisdiction of it at its creation; the domicile of the testator, if it was created by will (*First Nat. Bank v. Bank*, ii. 207), and it would seem the situs of the property if created by deed *inter vivos*.

III.

ESTATES.

§ 70. In certain cases it is regarded as essential that the whole *corpus* of a person's property should pass by the same law; and in some or all such cases the law of each State in which property of the estate is found permits it to pass, not in accordance with the law of the situs, but in accordance with one proper law. When that happens, however, the State in which property is situated keeps the administration of its portion of the estate in its own hands, lest its own creditors should suffer injustice by the foreign law.

Cases where the whole body of property owned by a person is treated together as a single estate are guardianship (for infancy or other incapacity), marriage, bankruptcy, receivership or other seizure by court, and death.

§ 71. When property is placed into the hands of a guardian because the owner is an infant, a lunatic, a spendthrift, or otherwise incapable, the power of the guardian extends only to property within the State of his appointment (iii. 189 *n.*); outside that State he cannot claim to be entitled, nor can he sue as guardian (iii. 189 *n.*). A guardian should therefore be appointed in every State where there is property. The fact that the owner has been subjected to guardianship in one State does not inhibit him from dealing personally with his property in another State (*Didisheim v. Bk.*, iii. 189; see iii. 195 *n.*). The property in each State must of course be applied to the benefit of the owner; but it is within the discretion of the courts of the situs whether the benefit of the owner requires that it should be transmitted entire to the guardian of the owner's person, or the income so transmitted, or both principal and income withheld and allowed to accumulate (*In re Knight*, iii. 183; *Chatard's Settlement*, iii. 185; *Nugent v. Vetzera*, iii. 56).

§ 72. At the time of the marriage interest in the personal property of each spouse passes to the other, if at all, according to the law of the "matrimonial domicile," that is, the place where they at the time

of marriage contemplate living together; which is usually the domicile of the husband (*Harral v. Harral*, ii. 231; *De Nicols v. Curlier*, ii. 210). Rights in land pass according to the law of the situs (*Smith v. McAtee*, ii. 228). If the property is removed to another State, the existing rights of the spouses continue (*Bond v. Cummings*, ii. 239). So of the wife's lien on the husband's estate (*Bonati v. Welsch*, ii. 243).

As to property acquired after marriage, it would seem clear that interests in it would pass according to the law of the situs at the time of the transaction (§ 67); the ordinary rule as to title of property applying, since it is a question of title to certain specific property acquired, not to a *corpus*. And it is so held in the United States (*Saul v. Creditors*, ii. 220; ii. 228 *n.*; *Le Selle v. Woolery*, ii. 246). And so when land of the wife is converted into personalty, the interests of the spouses is determined by the law of the place where the personalty is received (*Smith v. McAtee*, ii. 228; ii. 231 *n.*).

In England, however, it is held that after-acquired personalty goes according to the law of the matrimonial domicile (*De Nicols v. Curlier*, ii. 210), and the same has even been held in the case of land (*De Nicols v. Curlier*, ii. 216). This decision was based on a misunderstanding of a passage from Story (who was speaking of property of the spouses at the time of the marriage), and on the Continental law, which is indeed to that effect (*Anon.*, ii. 250), but only because such is the law of almost every European State, and therefore in each case where it is applied it is the law of the situs (*Samuel v. Arrouard*, ii. 251).

The right of creditors to have the property applied to the payment of their debts (*i. e.* the administration of the property) is always determined by the law of the situs (*Frierson v. Williams*, ii. 240; *La Selle v. Woolery*, ii. 246).

§ 73. A foreign bankruptcy at the bankrupt's domicile, or one to which he has submitted, passes the title to chattels as against the bankrupt (*In re Waite*, iii. 223). But the administration of the bankrupt's property is in the courts of the situs, which apply the chattels to the payment of creditors in accordance with their own law, and through their own assignee (*Re Artola*, iii. 220). At common law, foreign as well as domestic creditors may come in (*Trust Co. v. Dodd, Mead & Co.*, iii. 228), and by the Constitution of the United States individual creditors from all States of the Union must come in on an equal footing, though otherwise there is no reason why a State should not give preference to its own citizens (*Blake v. McClung*, iii. 236). The assets in each State may be marshalled in accordance with the law of the administering State (*Chipman v. Bank*, iii. 242; *Batcheller v. Bk.*, iii. 244).

Land will pass in bankruptcy only according to the law of the situs (*Osborn v. Adams*, iii. 218).

In the Civil Law it is unsettled whether all a person's property in every State passes when he is declared bankrupt at his domicile (that it does, *Piaggio v. Dacier*, iii. 248; *Wells v. Bank*, iii. 252; iii. 253 *n.* *Contra*, *A. v. B.*, iii. 247; *Mézières v. Bank*, iii. 251; *Klingsland v. Tom*, iii. 253; *Chale v. Artola*, iii. 254).

§ 74. The voluntary assignment of all a man's property for the benefit of his creditors is not, like bankruptcy, a recognized legal dealing with the corpus of an estate. It is usually held that if such an assignment is good by the law of the situs the title passes to the assignee, and the State of situs will not interfere even to administer it (*May v. Wannemacher*, iii. 195), and this even though by the law of the owner's domicile the transfer is invalid (*Mead v. Dayton*, iii. 214). On the other hand, if it is not valid by the law of the situs the assignee gets no title, though it is valid by the law of the place of transfer and of the owner's domicile (*Guillander v. Howell*, iii. 203). It has been held, however, in such a case, that it is at any rate valid against a citizen of the State of transfer (*Whipple v. Thayer*, iii. 208), and it is always upheld against the assignor or any one actually consenting to the transfer (iii. 210 *n.*). In short, such an assignment is treated according to the ordinary principles which apply to the transfer of property (§ 67), and the State does not undertake the administration of the assets for the benefit of creditors.

In Illinois, however, a voluntary foreign assignment of either real or personal property, though valid by the law of Illinois, is first administered for the benefit of domestic creditors before the assignee is allowed to take the balance (*Heyer v. Alexander*, iii. 210; iii. 214 *n.*); and this doctrine appears to be followed by the Supreme Court of the United States (*Barnett v. Kinney*, iii. 198).

The difference between a voluntary and a bankrupt assignment does not lie in the fact of a conveyance by the debtor, since he usually makes such a conveyance in the course of bankruptcy proceedings. The difference lies rather in the effect of the conveyance upon creditors. If as a result of the conveyance the debtor is to be discharged from his obligations whether creditors consent or not, the proceeding is a bankruptcy (*Trust Co. v. Dodd, Mead & Co.*, iii. 228).

§ 75. A receiver is appointed by a court to take all the property of a defendant. In England the Court of Chancery has even appointed a receiver for foreign land (*Anon. v. Lyndsey*, iii. 259), though its power admittedly does not extend to the land (*Langford v. Langford*, iii. 260), and the practice is not sound.

The power of the receiver in another State, since he receives no title, would seem to be less even than that of a foreign assignee; and he is, in fact, not allowed to take property to the exclusion of creditors who have already attached (ii. 268 *n.*; *Ward v. Mfg. Co.*, iii. 269), except creditors of his own State, who have been enjoined by the court which appointed him (*Gilman v. Ketcham*, iii. 279).

But if no creditors have attached, at any rate if there are no domestic creditors, he may take property even by suit in a foreign State (*Hurd v. Elizabeth*, iii. 265; see iii. 268 *n.*). A receiver who has once come into possession of property may hold it against all the world, even in another State into which he has carried it (*Ry. v. Packet Co.*, iii. 275; *Pond v. Cook*, iii. 83). And he is personally liable for his acts, though as an officer of court he is usually suable in the jurisdiction that appointed him only by order of court (*Paige v. Smith*, ii. 284).

Where there are assets of the defendant in several States, the proper procedure is to have a receiver appointed in each State (*P. v. Assoc.*, iii. 289). In that case the assets are separately administered in each State, and the acts of one receiver and judgments against him do not bind the assets in the hands of another receiver (*Reynolds v. Stockton*, iii. 300). Assets which have come into the hands of a receiver of one court will not be taken from him by another court (*Shields v. Coleman*, iii. 261).

The defendant often makes an assignment to the receiver; in which case the latter is treated as a voluntary assignee or an assignee in bankruptcy, as the case may be (*Ward v. Mfg. Co.*, iii. 269).

§ 76. Upon the death of an owner of property the whole movable estate passes together according to the law of his domicile at death; all States in which movable property belonging to the estate is found accepting that law as the rule of disposition of the property.

Thus if the deceased left no will, his estate will be distributed according to the law of his domicile at the time of his death (*Lawrence v. Kitteridge*, ii. 253). It is the law of his domicile as it stood at the time of his death that governs, rather than some later change, though the change is declared to be retroactive (*Lynch v. Paraguay*, ii. 255). The same rule is applied as to successions in the Civil Law (*G. v. S.*, ii. 259), except that in France and Italy the nation rather than the domicile of the deceased gives the law (*Zammaretti v. Zammaretti*, ii. 258).

In the case of a corporation for which a successor is named by the charter, the successor takes the movable property of the corporation everywhere upon its dissolution (*Relfe v. Rundle*, iii. 285).

§ 77. If the deceased left a will, the validity of the will, so far as the movable property is concerned, depends upon the domicile of the deceased at the time of death (*Dupuy v. Wurtz*, i. 186; *Moultrie v. Hunt*, ii. 261). This is true, though in fact all the estate of the deceased subject to disposition by the deceased is in another State (*Cameron v. Watson*, ii. 286). And if the will is valid by the law of the domicile the property will pass though it is situated in a State where the bequest would be illegal; but the courts of that State will not actively assist in carrying out the illegal purpose (*Dammert v. Osborn*, iii. 89). Since the validity of the will depends upon the law of the domicile at death, it would seem that the question of revo-

cation should be governed by the same law; with the possible qualification that if it had been revoked by the law of the domicile at the time of revocation it would be finally put an end to. But in an English case where the will was, it was claimed, revoked by marriage this was held to depend upon the law of the matrimonial domicile, being, it was said, an incident of the marriage (*In re Martin*, ii. 290).

A will of land, on the other hand, takes effect as a conveyance (§ 66), and must be good by the law of the situs (*Robertson v. Pickrell*, ii. 269), and if good there the land passes, though the will is invalid by the law of the domicile (*Carpenter v. Bell*, ii. 273). Where the will directs the conversion of one kind of property into another, it is to be governed by the rules applicable to the property before conversion. Thus a devise of personalty to be converted into realty is good if valid by the law of the domicile, though invalid by the law of the situs (*Canterbury v. Wyburn*, ii. 273). On the other hand where land was left in trust to convert it into personalty and hold the proceeds in trust, trusts being permitted by the law of the domicile but forbidden by the law of the situs of the land, the land passed free of trust; but upon its conversion into personalty, the trust attached to the latter (*In re Piercy*, ii. 279).

By the Civil Law, while the validity of a will as to substance is determined by the law of the domicile or of the nation, its form depends upon the law of the place of making (*Quartin v. Quartin*, ii. 295).

The construction of a will is determined by the law of the domicile at the time it is made, rather than at the time of death (*Staigg v. Atkinson*, ii. 283).

Where a power to appoint by will is created, it is to be governed by the law that applied to the original settlement, not by the law applying to the estate of the donee. Therefore if the power was created by will, its interpretation is governed by the law of the domicile at death of the donor, not of the donee (*Sewall v. Wilmer*, ii. 302; ii. 307 *n.*). A sufficient "will" to answer the requirement of the power appears to be a will sufficient either by the domicile of the donee or by that of the donor (*In re Price*, ii. 297; *GRAY, C. J.*, in *Sewall v. Wilmer*, ii. 305).

Capacity to receive a legacy and to give a good discharge appears to be governed by the law either of the court administering the estate or of the domicile of the legatee, whichever first gives capacity (*In re Hellman's Will*, ii. 26). As the property is within the power of the court, the law of the court must permit the payment; and if the time fixed by that law has come, there is no reason for delay. On the other hand, if the time fixed for acquisition of full capacity by the legatee has arrived at his domicile, there is equally no reason for delay. In some cases, however, the question is regarded as wholly governed by the law of the domicile of the legatee (*Woodward v.*

Woodward, ii. 26; Kohne's Case, ii. 30, cited; but see *S. v. Bunce*, iii. 25).

§ 78. While the distribution of an estate depends upon the law of the domicile of the deceased, the administration of the assets in each State is for the courts of that State, and is in accordance with its law (*Pardo v. Bingham*, iii. 161), except perhaps in the case of assets sent into the State for administration from another State where they were at the death of the deceased (iii. 162 *n.*). The estate is administered through a person designated by the court, called an executor or administrator; since no difference is made between these officers in the Conflict of Laws, the term administrator will in the subsequent discussion include the executor. The principal administrator is appointed at the domicile of the deceased; an ancillary administrator is or may be appointed in each other State where assets are found (*JACKSON, J.*, in *Stevens v. Gaylord*, iii. 125; *Goodall v. Marshall*, iii. 152). No ancillary administrator will be appointed where it is regarded as unnecessary (iii. 126 *n.*), or where the purpose of administration is regarded as illegal (*O'BRIEN, J.*, in *Dammert v. Osborn*, iii. 93). After payment of all debts, the State of ancillary administration may transmit the balance to the State of domicile of the deceased or, if there are no creditors there to be prejudiced by such a course, it may retain the balance and distribute it among those entitled by the law of the domicile of the deceased (*Harvey v. Richards*, iii. 174). Each administrator is responsible for so much of the estate only as has come to him (*Fay v. Haven*, iii. 126), and after he has by order of court transmitted the balance of the estate to the State of principal administration his entire responsibility ceases (*Emery v. Batchelder*, iii. 181).

The administration in each State is so far separate from that in any other that a judgment against an administrator in one State cannot be enforced against assets in another (*Johnson v. Powers*, iii. 103; iii. 108 *n.*).

§ 79. The administrator, upon his appointment, proceeds to get in so much of the estate as lies within his jurisdiction; that is, all assets situated within the State, which includes all chattels within its borders, and all choses in action over which it has peculiar power (§ 25). The administrator may also take anything brought into his State after the death of the deceased (*Pinney v. McGregor*, iii. 133) except property already taken in charge by the administrator appointed at its situs (iii. 136 *n.*). Ordinary debts have no situs, except so far as they may be said to exist wherever the debtor can be found. They are situated there to this extent, that the presence of a debtor in a State justifies the appointment of an administrator there to collect the debt (*Pinney v. McGregor*, iii. 133). Any administrator who can collect the debt by suit, by getting jurisdiction over the debtor or over his property, may collect it (*STINESS, J.*, in

Amsden v. Danielson, iii. 141), and therefore voluntary payment to any administrator within his own State discharges the debt (*Stevens v. Gaylord*, iii. 124).

Outside the State of his appointment an administrator as such has no power. He cannot take chattels, or sue to collect a debt belonging to the estate (*Johnson v. Powers*, iii. 103; iii. 104 *n.*). It has nevertheless been held that in a State where there is no administrator and no creditor, payment voluntarily made to a foreign administrator is a good discharge (*Wilkins v. Ellett*, iii. 136).

A foreign administrator may however claim property or sue when the right to do so has come to him personally. Thus he may sue on a judgment recovered by him as administrator in his own State (*Talmage v. Chapel*, iii. 102), or upon a claim accrued to him since the death of the deceased (*Vanquelin v. Bouard*, iii. 108; iii. 111 *n.*), and he may claim chattels bailed by him to a bailee outside his own State (*Currie v. Bircham*, iii. 111). In States where an executor becomes entitled in his own right as universal successor he gets a beneficial title which will be recognized in other States (*Vanquelin v. Bouard*, iii. 108; iii. 108 *n.*); and when he becomes entitled not in his representative capacity but as *persona designata* he may act anywhere, as where being named in a power of sale he executes the power (*Thurber v. Carpenter*, iii. 121; iii. 123 *n.*), or being named in a statute giving damages for death he sues in another State (*Wooden v. R. R.*, ii. 332).

An administrator may indorse a note or assign any transferable chose in action found in his jurisdiction, and the assignee may enforce anywhere his rights as owner (*Petersen v. Chemical Bank*, iii. 113; iii. 120 *n.*).

§ 80. A creditor of the estate may prove his claim in any State in which assets are being administered (*Goodall v. Marshall*, iii. 152). The marshalling of assets between claimants is a matter to be determined by the law of the court administering the assets (*Goodall v. Marshall*, iii. 152; iii. 161 *n.*; *Anon.*, iii. 162; *Young v. Wittenmyre*, iii. 163; *Cowden v. Jacobson*, iii. 165), as is the granting of a widow's allowance (*Smith v. Howard*, iii. 169). Where one has an election between the provisions of the will and his claim upon the estate outside the will, this is to be regulated by the law of the domicil (ii. 286 *n.*).

A creditor cannot demand payment of an administrator outside his own State; that is, no action will lie against a foreign administrator (*Judy v. Kelley*, iii. 98; iii. 100 *n.*). A foreign administrator may of course be sued anywhere on a contract made by him for the benefit of the estate after the death of the deceased, since he is personally liable upon it (*Johnson v. Wallis*, iii. 101); and in some jurisdictions a foreign administrator may be sued if he brings assets into the State or receives assets there (*Campbell v. Tousey*, iii. 97; iii. 101 *n.*), or even if he resides or is found there (iii. 101 *n.*). This is not the

better view, but it is usually held that if he brings assets into the State and repudiates his liability he may there be held to account in equity (iii. 101 *n.*).

IV.

OBLIGATIONS.

§ 81. A judgment to be recognized abroad must be given by a court having jurisdiction to give it (§ 36), and the finding of the court upon the facts requisite for jurisdiction in the international sense will not be final, but the question of jurisdiction of the State in the matter will be examined in each other State where the judgment is set up: since if there was no jurisdiction there was no judgment (i. 408 *n.*; *Cummington v. Belchertown*, i. 417). Not only the jurisdiction, but all the requisites of valid judicial process are the subject of inquiry. In order that an act of government may be recognized as a judgment, it must appear that there were regular judicial proceedings before a judge (who cannot have been a party), and that a chance to be heard was afforded to parties interested (*Sawyer v. Ins. Co.*, iii. 294; iii. 296 *n.*). If these requisites are not satisfied, it is not enough that the act was called a judgment in the foreign State (*Foote v. Newell*, iii. 297). The judgment must be responsive to the pleadings, unless parties were present and waived the defect (*Reynolds v. Stockton*, iii. 300). To be recognized abroad, the judgment in the country where it is rendered must be regarded as a final and binding judgment (*Nouvion v. Freeman*, iii. 305; *A. v. H.*, iii. 314), though the fact that it is subject to be set aside, as upon appeal, does not interfere with its binding effect so long as it stands (*Paine v. Ins. Co.*, iii. 310).

§ 82. A foreign judgment creates an obligation which is both recognized and enforced in another State (*Godard v. Gray*, iii. 316). This is true whether the judgment is at law or in equity (Lord ELLENBOROUGH in *Sadler v. Robins*, iii. 338), and whether it is for the plaintiff or the defendant (*Paine v. Ins. Co.*, iii. 310), and it is equally binding though a suit between the same parties with the same subject-matter was pending in the other State, and even if proceedings were first begun there (*Paine v. Ins. Co.*, iii. 310); nor do mistake of law or of fact (*Godard v. Gray*, iii. 316) or irregularity of local practice (*Pemberton v. Hughes*, iii. 322) in the foreign court affect the binding nature of a judgment. It is often said that a foreign judgment may be impeached for fraud, and indeed it may usually, like a domestic judgment, be so impeached in equity (iii. 342 *n.*); but by the better view it cannot be so impeached at law, though this doctrine is sometimes referred to the Constitution and confined to interstate judgments (*Christmas v. Russell*, iii. 339;

GRAY, J., in *Hilton v. Guyot*, iii. 331; see *Abercrombie v. Abercrombie*, iii. 342). The judgment must be for a sum of money of ascertained amount; if the amount is uncertain the judgment cannot be enforced (*Sadler v. Robins*, iii. 337); but it may be for an amount payable from time to time, like a decree for alimony, and it will then be enforced as to all overdue payments (*Bullock v. Bullock*, iii. 355; *Lynde v. Lynde*, iii. 356).

An equitable decree for the doing of an act, except the mere payment of money, is not by our law enforceable in another court, even of the same State; there is no form of proceeding for enforcing the merely personal decree of a court of equity, except by order of the court rendering it. It is therefore impossible to enforce a foreign decree that an act be done by the defendant, such as making a conveyance, either by decreeing the conveyance without judicial investigation or by regarding it as made (*Bullock v. Bullock*, iii. 348; but see *Burnley v. Stevenson*, iii. 345). An additional objection to enforcing such a decree is that it is not in its nature the establishment of an obligation, but rather a method of enforcing an obligation, a form of execution (*Bullock v. Bullock*, iii. 348).

An earlier doctrine, entirely overthrown in England and generally in the United States, that a foreign judgment was merely *prima facie* evidence of the justice of the claim, still prevails in a few jurisdictions (iii. 322 n.).

A peculiar doctrine of the Supreme Court of the United States is examined below (§ 83).

§ 83. In the Civil Law a judgment is quite differently treated. No action lies upon a judgment by that law, and therefore that method of enforcing a foreign judgment, which prevails at common law, is not possible. By the Civil Law a judgment, (like some other formal obligations) when made the basis of a legal proceeding may be examined by the court merely for the purpose of investigating the justice of its original rendering; certain defences may be set up, others are not allowed. After this examination into the merits of the judgment if it is approved it is declared executory, without a new judgment being rendered; and thus the foreign judgment itself is eventually enforced. This examination of the merits is a matter of public policy (*Landesbrandcasse v. Assur. Belges*, iii. 365).

If a foreign judgment is not made the basis of suit, but is set up as having created a status (as for instance a decree of divorce) it is given full effect (*X.'s Appeal*, iii. 364).

There is another way in which proceedings may be had on a domestic judgment without bringing suit upon it; it may be declared executory by writ of the President of a Tribunal, without hearing on the merits, and then execution will be issued upon it at once. This cannot be done in the case of a foreign judgment unless there is a provision for it in a treaty (*Holker v. Parker*, iii. 357) or, in several States, in cases where the country in which it was rendered

does the same for judgments of the forum (*Economo v. Mesciadis*, iii. 359; *W. v. J.*, iii. 361).

Where a foreign judgment will not be declared executory, suit may be brought upon the original claim (*Tilkin-Mention v. Byrne*, iii. 358; but see *Dreyfus v. The Cinque-Sorelle*, iii. 364).

The difference between this system and that of the Common Law is clear. There is no process similar to ours. The process afforded for realizing upon a foreign judgment is the same as that provided for a domestic claim of a similar nature. But the process of declaring a judgment executory, granted to foreign judgments by treaty and in some States, as a result of statute, on the basis of reciprocity, grants to a foreign judgment much greater force than is given to such a judgment in any Common-Law State. It is apparent, therefore, that foreign decisions, entirely apart from the different system of law under which they were rendered, could be no authority for a doctrine of the Common Law by which a distinction should be made between foreign judgments of different countries upon some principle of reciprocity. Yet the Supreme Court of the United States, overlooking these differences, held upon the Civil Law authorities that suit could not be brought in this country upon a French judgment since a judgment rendered in this country would not be declared executory in France without an examination of the merits (*Hilton v. Guyot*, iii. 327).

§ 84. Upon a judgment being rendered, all issues of record become, as to parties bound by the judgment and their privies, binding in all future proceedings. This effect of *res judicata* results from all kinds of judgments. Thus in the case of a judgment *in rem*, since all persons interested in the *res* are called upon to appear and have a right to be heard, the final disposition of the *res*, the title as adjudicated, is binding upon all the world. The same thing is true in such an action as to all facts recited in the judgment (*Croudson v. Leonard*, iii. 367). And it is only a judgment *in rem* that can affect title as to all the world (*Clarke v. Clarke*, iii. 385). A finding of a fact essential to jurisdiction (such as domicil, where jurisdiction depends upon that) is of course not binding (*Overby v. Gordon*, iii. 377). In the case of a personal action only parties and their privies are bound (*Hohner v. Gratz*, iii. 373), as for instance a stockholder is bound by a judgment that the corporation owes a debt (*Tel. Co. v. Purdy*, iii. 374). A notion that there is no *res judicata* in actions of tort appears to be without foundation (*Hohner v. Gratz*, iii. 373).

The doctrine of *res judicata* in connection with foreign judgments prevails in the Civil Law; a foreign judgment need not be declared executory in order to be recognized as *res judicata* (iii. 390 n.; see *Soc. de Navigation v. Naville*, iii. 389).

§ 85. Where a court exercising jurisdiction *in rem* declares the title, the title so declared must be recognized everywhere (*Hughes v. Cornelius*, iii. 391); the only difficulty being to determine whether

a court which could exercise jurisdiction over property has in fact proceeded against the property or has acted *in personam* (Castrique v. Imrie, iii. 391). The question is, what was the effect of the judgment where it was rendered; if by the law there it did not affect the title, it cannot be held to have done so in a State where similar proceedings would have had that effect (The City of Mecca, iii. 397); while if the proceedings affected the title by the law of the State where the judgment was given the effect will be recognized even in a State where such proceedings would not have had such an effect (S. S. Co. v. Bank, iii. 399).

§ 86. An obligation *ex delicto* is governed by the law of the place where it arises; or, in the language of the Common Law, liability in tort depends upon the law of the place where the act claimed to be a tort was committed (WILLES, J., in Phillips v. Eyre, ii. 309; Le Forest v. Tolman, ii. 315; Davis v. R. R., ii. 316), and therefore an act which does not give rise to liability where it was committed cannot be the basis of an action anywhere (Phillips v. Eyre, ii. 308; Beacham v. Portsmouth Bridge, ii. 328). Thus the law of the place of the act determines whether damages will be given against one who causes the death of another (Wooden v. R. R., ii. 332; R. R. v. Babcock, ii. 335), whether an action of tort survives (Higgins v. R. R., ii. 320; but see Whitten v. Bennett, ii. 323), whether a master is liable to his servant for a tort committed by a fellow-servant (Alexander v. Pennsylvania Co., ii. 325; see ii. 328 *n.*), and whether contributory negligence bars a right of action (DEVENS, J., in Davis v. R. R., ii. 317; R. R. v. Whitlow, ii. 329). This general doctrine is applied, so far as possible, to torts committed on the high seas (The Scotland, ii. 341; ii. 347 *n.*).

In England, however, the law of the forum seems to be relied upon, at least to this extent: that if the foreign act where done was not entirely justifiable, and by the English law it would constitute a tort, an action will lie in England, though where done it gave rise to no liability in favor of the injured party (Machado v. Fontes, ii. 311); while even if by the law of the place of the act liability arose to the injured party, he will not be allowed to recover in England unless the act would constitute a tort by the English law (The Halley, ii. 337).

Except in England, a cause of action sounding in tort may be enforced in any jurisdiction, even where the act out of which the cause of action arose would not be a tort (Walsh v. R. R., iii. 445), as for instance where the action is given, by statute, for causing the death of a human being (Dennick v. R. R., iii. 436; see Richardson v. R. R., iii. 434). The action is allowed for any act made tortious by statute so long as the remedy is compensatory (Gardner v. R. R., iii. 443), but not of course where it is for the recovery of a penalty (§ 50).

§ 87. Where a contractual obligation is in question, the place of

making the contract is important; and before considering the law that applies to contracts, it is first essential to determine the place of contracting.

A contract is made at the place where it first becomes a binding obligation. Thus, a bond is made where it is delivered, not where it is signed (*Baring v. Commrs.*, ii. 348); a policy of insurance mailed directly by the company to the assured is made where it is mailed (*Ins. Co. v. Tuttle*, ii. 350), but a policy sent to an agent of the company and by him delivered to the assured is made at the place of delivery (*Assurance Soc. v. Clements*, ii. 352); a note sent by mail is made where it is delivered to the payee (*Staples v. Nott*, ii. 354); a sale of chattels, where the goods sold are delivered to an express company for the purchaser (*Mack v. Lee*, ii. 356); a contract made by letter, where the letter of acceptance is mailed (*Worcester Bk. v. Wells*, ii. 358; see *Bernheim v. Raaz*, ii. 362), and so of a contract completed by telegraph (*Perry v. Mount Hope Iron Co.*, ii. 357). A unilateral contract is made where the consideration is performed; thus a contract of guaranty is made where the guaranty is acted upon (*Milliken v. Pratt*, ii. 11). A contract made by an agent is made where the agent acts (*Gray, C. J.*, in *Milliken v. Pratt*, ii. 13), even where, the agent being unauthorized, the principal is not liable without ratification (*Hill v. Chase*, ii. 361).

§ 88. All questions as to the form of a contract depend upon the law of the place of contracting. Thus that law determines whether a stamp is required for validity (*Clegg v. Levy*, ii. 363; but see *Valery v. Scott*, ii. 373), and whether the contract must be in writing (*Scudder v. Bank*, ii. 364; *Hunt v. Jones*, ii. 367; ii. 369 *n.*; but see *Hall v. Cordell*, ii. 370). So the law of the place of making determines the form of a mercantile instrument (ii. 512 *n.*).

§ 89. Capacity to contract depends, in the United States, upon the law of the place of contracting (*Milliken v. Pratt*, ii. 11; ii. 512 *n.*); even though there is capacity by the law of domicile, but none by the law of the place of contracting (*Nichols & Shepard Co. v. Marshall*, ii. 21). In England, as has been seen (§ 46) capacity is said to be governed by the law of the domicile (*Cotton, L. J.*, in *Sottomayor v. De Barros*, ii. 72), though the question is not definitively settled (*Cooper v. Cooper*, ii. 9).

§ 90. The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles (§ 14) be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it (§ 4). If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so.

On sound principle, therefore, everything which has to do with the validity and the nature of the obligation should be determined by the law of the place of making. And this is held in several jurisdictions. Thus it has been held that the validity of a contract depends upon the law of the place of contracting (Lord ELLENBOROUGH in *Clegg v. Levy*, ii. 363; HUNT, J., in *Scudder v. Bank*, ii. 366; *Carnegie v. Morrison*, ii. 394), so that if by that law the contract is void it can nowhere be regarded as valid (*Kennedy v. Cochrane*, ii. 400; *Arbuckle v. Reaume*, ii. 404) even though it is valid by the law of the place of performance (*Blackwell v. Webster*, ii. 402; but see *Richardson v. Rowland*, ii. 404 *n.*). Thus the validity of the consideration (ii. 512 *n.*), the nature of the obligation, as whether it is negotiable (*Ory v. Winter*, ii. 511; ii. 512 *n.*; *Bank v. Talbot*, ii. 405), the rights of parties (*Carnegie v. Morrison*, ii. 394; *Millard v. Brayton*, ii. 408), the existence of conditions (*Mut. Life Ins. Co. v. Cohen*, ii. 508) are determined by that law.

But a doctrine which has obtained considerable currency is that the validity of a contract depends upon the law of the place of performance (*Pritchard v. Norton*, ii. 388; TANEX, C. J., in *Andrews v. Pond*, ii. 412). This indefensible notion is based upon a dictum of Lord MANSFIELD (*Robinson v. Bland*, ii. 376), in which the other judges did not concur. The majority of the court in that case suggested a rule never adopted in any case, that is, that the validity is to be determined by the law of the forum. This doctrine that the law of the place of performance governs leads to difficulty when performance is to be made in more than one place; and here the courts adopting this rule "fall back upon" the law of the place of making (*BRADLEY, J.*, in *Morgan v. R. R.*, ii. 504; ii. 542 *n.*).

The doctrine at present prevailing in England and probably in the Supreme Court of the United States and in many States, is that the law governing the contract is the law which the parties intended to govern it (*In re Missouri S. S. Co.*, ii. 381; *Liverpool S. Co. v. Ins. Co.*, ii. 531). But as this intention must be drawn from the contract itself (at least if it is a written contract) there is usually no direct evidence of the intention, and the court falls back upon presumption. Courts are by no means agreed as to the proper presumption in this case. It has been said that the court will presume that the parties intend to be governed by the law of the place of making (FRY, L. J., in *In re Missouri S. S. Co.*, ii. 386; GRAY, J., in *Liverpool S. Co. v. Ins. Co.*, ii. 536), by the law of the place of performance (FELL, J. in *Burnett v. R. R.*, ii. 547), and by the law of that one of these two places which makes the contract valid (FRY, L. J., in *In re Missouri S. S. Co.*, ii. 387; MATTHEWS, J., in *Pritchard v. Norton*, ii. 391; *Bigelow v. Burnham*, ii. 423; COLE, J., in *Talbot v. Transp. Co.*, ii. 544). The whole doctrine seems unsound, as it is opposed to the principle that rights are created not by the will of the parties but by the law (§ 2).

§ 91. Contracts claimed to be usurious seem to have been dealt with in a special way (BECK, C. J., in *Bigelow v. Burnham*, ii. 424). The courts, whether from love of commerce or from hatred of usury laws, have upheld contracts whenever it was possible against the defence of usury. They have generally upheld the contract if it was valid either by the law of the place of making or by that of the place of performance, upon the theory that the parties chose to be governed by that law which gave validity to their acts (ii. 414 *n.*; *Bigelow v. Burnham*, ii. 423), and some courts have gone so far as to allow the contract validity as a result of some third law chosen *bona fide* (as for instance the law of the debtor's domicile) though the contract is invalid both by the law of the place of making and by that of the place of performance (*Scott v. Perlee*, ii. 419). And where the contract is simply the renewal of an earlier contract, valid where made, but void by the law that governs the renewal, the new contract has been upheld (*Savings Bank v. Low*, ii. 428). But this broad right to choose one's law is subject to certain exceptions. The right of choice is denied and the contract subjected to the law of the place of making if the contract is usurious by both laws (*Andrews v. Pond*, ii. 410), or if the law of the place of making is prescribed by a statute of that place (*Fowler v. Trust Co.*, ii. 425); and the same rule has been followed where the usury consists not in a loan upon usurious interest, but in the usurious discounting of a note (*Brown v. Nevitt*, ii. 414). In a few States usury is rigidly governed by the law of the place of contracting (*Akers v. Demond*, ii. 416).

A usury act may not affect the validity of the obligation, but merely bar a remedy; in such a case it is on general principles (§ 54) applicable only to suits in the courts of the State (*Gale v. Eastman*, ii. 430).

§ 92. Where it is claimed that one is bound by a contract entered into by his agent, two questions arise; whether the actor was his agent, and what was the effect of the act. Whether the actor was an agent is purely a question of fact, depending solely upon evidence. The authorizing of an act by an agent is not the creation of a right; it depends solely upon the will of the party, not upon the law. Legal capacity is therefore not necessary in order to create an agency (*Milliken v. Pratt*, ii. 11; but see *Freeman's Appeal*, ii. 17). If the alleged agency was created by instrument in writing, the meaning of the instrument might of course depend upon the law, as it certainly would upon the language, of the place of making (*Chatenay v. Tel. Co.*, ii. 453); and if it were to be inferred from a contract, the effect of the contract being in question, the law of the place of contracting would be important. Thus where one entered into a limited partnership in Cuba, the question whether the special partner was a party to the act of a general partner would depend upon the nature of a special partnership according to the Cuban law (*King v. Sarria*, ii. 448).

The existence and extent of the agent's authority having thus been determined as a question of fact (in the determination of which the law of the place of creation is only incidentally involved), the question whether the agent in carrying out this authority binds his principal depends upon the law of the place where the agent acts (*Chatenay v. Tel. Co.*, ii. 453; *Milliken v. Pratt*, ii. 11; but see *Freeman's Appeal*, ii. 17). Thus, whether a man is responsible as partner for the act of one with whose business he has some connection depends upon the law of the place where the contract is made upon which it is attempted to hold him (*Waverly Nat. Bank v. Hall*, ii. 445; *Baldwin v. Gray*, ii. 447).

§ 93. The obligation of a carrier, though not strictly contractual, depends upon the voluntary assumption of a duty, and the extent of the obligation should therefore be determined by the law of the place where the duty arises (*Liverpool S. Co. v. Ins. Co.*, ii. 531; *Talbot v. Transportation Co.*, ii. 542; *Dike v. Erie Ry.*, ii. 539), though a few cases apply the law of the place of performance (*Burnett v. R. R.*, ii. 546); and the latter law is rightly held to govern matters which have to do with performance (*Curtis v. R. R.*, ii. 544).

§ 94. The interpretation of an instrument is a question rather of fact than of law; but the court in interpreting is assisted by certain canons of construction, some of which have to do with the Conflict of Laws.

If the instrument is the instrument of one party it should be given the interpretation which it would have at the domicile of the writer; as in the case of a will (§ 77), or of a power of attorney (*Chatenay v. Brazilian &c. Tel. Co.*, ii. 453). This is true as to covenants in deeds of foreign lands (*Bethell v. Bethell*, ii. 441). So of any portion of a document which may be regarded as the language of one party (*Knights Templars Assoc. v. Greene*, ii. 434). Usually, however, the instrument must be regarded as the joint act of the parties. If both parties are domiciled in the same State, that State would naturally supply the interpretation (*Mullen v. Reed*, ii. 431). It has, however, been held that the interpretation of an instrument was to be according to the law of the place of performance (*London Assurance v. Co. de Moagens*, ii. 438).

§ 95. The effect of a contract is determined by the law of the place where the effect is to be had. Thus, the effect of drawing a bill upon a fund in the hands of the drawee, whether or not it operates as an assignment, depends upon the law which controls the fund (ii. 531 n.; but see *Blanzzy Coal Co. v. Davillier*, ii. 530). The effect of carrying out the terms of a contract depends on the law of the place of performance (*Waverly Nat. Bank v. Hall*, ii. 445). The effect of payment of part of a judgment debt by a joint defendant depends upon the law of the place of the judgment (*Greenwald v. Kaster*, ii. 504). The effect of breach of a contract for arbitration, whether or not the court is ousted from jurisdiction, depends upon the law of the

place at which the arbitration should have taken place (*Hamlyn v. Talisker Distillery*, ii. 456).

§ 96. Questions as to the performance of a contract depend upon the law of the place of performance. Thus the acts required of sureties are those laid down at the place for the principal to perform (*Cox v. U. S.*, ii. 473). What constitutes payment (*Graham v. Bank*, ii. 479), the application of payments (*Queen v. Ogilvie*, ii. 483), the time for payment (*Stebbins v. Leowolf*, ii. 478; *Rouquette v. Overmann*, ii. 522; *Rotta v. Ehrst*, ii. 529), the allowance of days of grace on a note (*Bowen v. Newell*, ii. 528) and the proper medium of payment (*Benners v. Clemens*, ii. 479) all depend upon the law of the place of payment; and the same law regulates the rate of interest and the measure of damages (§ 54). The form of protest for non-payment of a bill is also regulated by the law of the place of payment (ii. 522; see *Gibbs v. Sewastianoff*, ii. 528). It has, however, been held that the necessity for notice of non-payment of a bill and the nature of the notice depend upon the law of the place where the obligation arises (*Aymar v. Sheldon*, ii. 518); and it has been held in England that performance is to be excused, if at all, by the law of the place of contracting (*Jacobs v. Credit Lyonnais*, ii. 468).

§ 97. It would seem that the discharge of a contract also should be governed by the law of the place of performance; but authority seems to refer it to the law of the place of contracting, as a question that has to do with the nature of the obligation. Thus, the discharge of a surety is held to depend upon the law of the place of contracting (*Tenant v. Tenant*, ii. 505); and so of discharge of an obligation for non-performance (*Morgan v. R. R.*, ii. 501). So discharge of a contract by proceedings in bankruptcy depends upon the law of the place of contracting (*Gibbs v. Soc. Industrielle*, ii. 486), though in this country, perhaps as a result of the Constitution, it is held to depend upon jurisdiction over the creditor (*Felch v. Bugbee*, ii. 489; *Phoenix Bank v. Batcheller*, ii. 493). A corporation was held discharged from its obligations according to the law of the State of charter (*Ry. v. Gebhard*, ii. 496). Where discharge is alleged because of the receipt by the creditor of a note in payment, the law of the place of performance seems to be accepted as controlling (*Tarbox v. Childs*, ii. 476).

§ 98. As a general rule a valid contract will be enforced in a foreign State, even if such an agreement there made would not have been legally binding (*Greenwood v. Curtis*, iii. 474); and this has been held even of a contract to convey land in the State in which suit is brought (*Polson v. Stewart*, iii. 491). Even a contract made by parties who contemplated a breaking of the laws of the forum will be enforced in favor of a party who took no part in the actual law-breaking (*Waymell v. Reed*, iii. 446; *Hill v. Spear*, iii. 447).

Where, however, the contract or the enforcement of it is contrary to the public policy of the forum (§ 48) it will not be enforced

(*Emery v. Burbank*, iii. 484; *Delaunay v. Ins. Co.*, iii. 497). Thus if it is immoral (*Flagg v. Baldwin*, iii. 461) or if it is an agreement to effect an illegal object (*Hope v. Hope*, iii. 468) or to evade the law of the forum (TURNER, L. J., in *Hope v. Hope*, iii. 471) the courts will refuse to entertain action upon it. As it is a question of public policy, courts well may and do differ in particular cases. Thus it has been held that a contract limiting the liability of a carrier for negligence, good where made, but invalid by the law of the forum, will be enforced (*Fonseca v. S. S. Co.*, iii. 477), and that it will not (*The Kensington*, iii. 478). So it has been held, in a State where a married woman is incompetent to contract, that public policy forbids suit against a married woman there domiciled upon a valid contract made by her abroad (*Armstrong v. Best*, iii. 487); but the contrary has been intimated (GRAY, C. J., in *Milliken v. Pratt*, ii. 17). It has been held that if any part of a contract is obnoxious to the local law no other portion of the same contract, though harmless in itself, will be enforced (TURNER, L. J., in *Hope v. Hope*, iii. 473; but see *Greenwood v. Curtis*, iii. 474).

§ 99. The existence of a quasi-contractual obligation depends upon the law of the place where the acts were done which gave rise to the obligation (*Brackett v. Norton*, ii. 548).

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